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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of New South Wales

IN ITS COMMON LAW JURISDICTION

IN THE YEAR 1877.

REPORTED BY

GEORGE KNOX,

M.A., Cantab. & Syd.

and of Lincoln's Inn, Esq., Barrister at Law.

VOL. I.

Sydney:

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1891.

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THE

SUPREME COURT OF NEW SOUTH WALES.

The Hon. Sir JAMES MARTIN, Knt., Chief Justice.
The Hon. JOHN FLETCHER HARGRAVE, Esq.
The Hon. PETER FAUCETT, Esq.
The Hon. Sir WILLIAM MONTAGU MANNING.
} Puisne Judges.

Primary Judge in Equity,

The Hon. JOHN FLETCHER HARGRAVE, Esq.

Judge of Divorce and Matrimonial Causes,

The Hon. JOHN FLETCHER HARGRAVE, Esq.

Chief Commissioner in Insolvency,

GEORGE HIBBERT DEFFELL, Esq.

Attorneys-General,

The Hon. WILLIAM BEDE DALLEY, Esq.
The Hon. WILLIAM CHARLES WINDEYER, Esq.
The Hon. WILLIAM JOHN FOSTER, Esq.

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ALPHABETICAL TABLE OF CASES

REPORTED IN THIS VOLUME.

	PAGE
Adams, *Ex parte*	459
Anderson *v.* Johnson ...	1
Ash *v.* Jones	235
Bedwell, *in re*...	186
Bell *v.* Miller	331
Bland, *Ex parte*	521
Blaxland *v.* Australasian Steam Navigation Company...	434
Bray *v.* Tayler...	201
Brisbane Oyster Fishery Co. v. Emerson ...	80
Broughton, *Ex parte* ...	189
Brown, *Ex parte*	320
Buckstone *v.* Bennett ...	481
Burne & Kavanagh, *in re*	254
Cafe *v.* Morrison	161
Campbell *v.* The Commercial Banking Company of Sydney ...	14
Campbell *v.* The Commercial Banking Company of Sydney ...	240
Carruthers, *Ex parte* ...	295
Casey *v.* Wentworth ...	16
Challoner *v.* McPhail ...	157
Churchill *v.* Williams ...	521
Commercial Banking Company of Sydney *v.* Strauss	524
Collier, *Ex parte*	513
Drury *v.* The Australasian Steam Navigation Company... ...	441
Dunn, *Ex parte*	293
Eddy *v.* The Bank of New South Wales	299
Ellis *v.* Meyerfeld	366
Flood *v.* Longford	449
Freeman *v.* Withers ...	6
Guest, *Ex parte*	284
Hall *v.* Ivory	401
Hasking, *Ex parte*	151
Haslingden, *in re*	416
Hyman *v.* Benson	4
Illidge *v.* Leary	139
Joachim *v.* O'Shanassy ...	98
Joachim *v.* O'Shanassy ...	118
Johnson *v.* Poole	196
Johnson *v.* Poole	394
Jones, *Ex parte*	263
Kearns, *Ex parte*	13
King *v.* The Bulli Coal Company...	389
Laing *v.* Bain	28
Laing *v.* Bain	264
Laing *v.* Bain	284
Lockhart *v.* Dymock ...	181
Long *v.* Drinan	152
Lyons *v.* Cohen	92
Lyons *v.* Samuel	177
McElhone *v.* Young ...	493
McLauchlan *v.* The Standard Fire and Marine Insurance Company of New Zealand	224
McPherson *v.* The Borough of Bathurst	204
McPherson *v.* The Borough of Bathurst	370

	PAGE
Martin *v.* Baker	418
Meyer, *Ex parte*	319
Meymott *v.* Piddington ...	306
Moscrop *v.* Jacobs	324
Nerney *v.* The Queen ...	287
Oliver *v.* Sheppard	515
Owston *v.* The Bank of New South Wales ...	36
Owston *v.* The Bank of New South Wales ...	90
Pennington, *Ex parte* ...	317
Pennington, *Ex parte* ...	376
Pollard, *Ex parte*	501
Rand *v.* Williams	350
Read and White, *Ex parte*	26
Readford, *Ex parte*... ...	152
Regina *v.* Allison	202
Regina *v.* Bradbury ...	162
Regina *v.* Burns and Mack	183
Regina *v.* Combo	91
Regina *v.* Duncan	170
Regina *v.* Haggard... ...	12
Regina *v.* Jenkins	295
Regina *v.* Jones	170
Regina *v.* Jourdain... ...	465
Regina *v.* Knowling ...	329
Regina *v.* Lewis	8
Regina *v.* Swift	325
Regina *v.* Thompson ...	454
Ricketson *v.* Barbour ...	72
Ricketson *v.* Barbour ...	453
Rochester *v.* Sullivan ...	406
Rowan, *Ex parte*	321
Sandeman *v.* Cohen ...	371
Sandeman *v.* Cohen ...	496
Sandeman *v.* Robinson ...	382
Seamer *v.* Manning ...	305
Sevil *v.* Heath...	200
Sevil *v.* Heath...	359
Sheather *v.* The Clarence and Richmond Rivers Steam Navigation Company	455
Sheppard *v.* Dunn	486
Shoveller, *Ex parte*... ...	174
Throsby *v.* Keighran ...	141
Tonkin, *Ex parte*	362
Trimble *v.* Hill	405
Trimble *v.* Hill	472
Twaddell *v.* Driver	459

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN THE FIRST TERM, 1877.

ANDERSON *v.* JOHNSON. (*a*)

Action by Chairman of Foreign Unincorporated Company on Covenant made with Trustees for Company.—Right to sue.

By an Act of the Legislature of Victoria it was provided that the full benefit of all contracts made with any persons on behalf of a company carrying on business in Victoria should vest in the chairman for the time being, and also that all actions, suits, &c., should be brought in his name. The defendant made in Victoria a covenant with certain persons on behalf of the company. *Held*, that the chairman of the company could maintain an action in New South Wales for a breach of this covenant.

The declaration stated that the plaintiff sued as the chairman of the directors of the Australian Alliance Assurance Company and on behalf of all the members of that company, and set out a covenant by the defendant with certain persons called "the mortgagees." Averment that by an Act passed in the colony of Victoria before the date of the indenture containing the said covenant it was amongst other things enacted that all actions, suits, or proceedings at law or in equity which should thereafter be commenced or taken by or on behalf of the said company, either alone or jointly with others, whether against any member of the said company or against any other person, might and should be commenced or taken in the name of the person who should at the time be chairman of the directors of the said company as the nominal plaintiff, complainant, petitioner, or applicant on behalf of all the members of the said company, and

(*a*) March 7.

carried on in his name while he continued in office. And that the full benefit of all securities for money theretofore taken by or assigned to, or which might thereafter be taken by or assigned to, persons in trust for or on behalf of the said company, and of all warrants of attorney, covenants and agreements theretofore given or assigned to or made with or which might thereafter be given or assigned to or made with any persons in trust for or on behalf of the said company, should vest in the chairman for the time being of the directors of the said company and his successors in that office, in trust for the said company, and any action, suit or other proceeding either at law or in equity might be brought or taken thereon in the name of the person who should at the time be the chairman of the directors and prosecuted as thereinbefore directed with regard to proceedings thereafter to be taken in the name of the chairman of the directors on behalf of the said company. Averment that the defendant executed the said indenture in the colony of Victoria, and that the said indenture was and is a security for money taken by the mortgagees on behalf of the said company. Performance of conditions precedent and breach of the covenant.

There were also counts for "money payable to the plaintiff as such chairman as aforesaid" for money lent, money paid, interest, and money due on accounts stated.

Demurrer, on the grounds:—1. That the Act of the Legislature of Victoria in the first count mentioned does not operate in this colony so as to entitle the chairman for the time being of the directors of the company in the said count mentioned to sue in New South Wales under the sections in the said count set out.

2. That the said count does not show that the plaintiff is entitled to bring this action at all against the defendant, or, if at all, in New South Wales.

Joinder in demurrer.

M. H. Stephen in support of the demurrer. It is settled that a foreign corporation can sue in our Courts in their corporate name, but it is stated in *Lindley on Partnership* (*b*) that a company empowered by a foreign or colonial Government to sue and be sued by a public officer could not so sue or be sued in England. But the text is not borne out by the case cited, *Alivon* v. *Furnival*. (*c*) Here it is not necessary to go so far, as the contract sued upon is not made with the company, but with persons on their behalf. The mortgagees are the only persons entitled to sue in this Court. This Court is not bound by an Act

(*b*) p. 1515, 3rd Ed. (*c*) 1 C. M. and R. 277.

of another colony regulating the mode of procedure. The rule is that the parties must sue according to the law of the country where the action is brought. Here the chairman, if he represents any one, represents only the *cestuis que trustent* and not the trustees, with whom the contract was made. At any rate, the money counts cannot be supported. The money cannot be payable to the chairman, even if he have the right of suing for it.

Davis in support of the declaration. There is no difference in principle between the case of foreign corporations and the present case. [SIR JAMES MARTIN, C.J.. When a foreign corporation sues, the contract sued upon is made directly with the corporation. Why do not the trustees sue the defendant on his covenant with them?] *The Bank of Australasia* v. *Nias (d)* and *The Bank of Australasia* v. *Harding (e)*, are directly in point. These actions were brought against the shareholders of the Bank of Australia in England upon judgments obtained in this colony by the Bank of Australasia against the chairman of the Bank of Australia, who was sued on behalf of the bank by virtue of a local Act. The present is a stronger case, for the defendant entered into this covenant in Victoria. His contract must be subject to the incidents introduced into it by the *lex loci*. [SIR W. MANNING, J.: Is it not the same as if the stipulations of the Act had been inserted in the deed?] He would then be estopped from objecting to being sued by the chairman, and he is in the same position now. Again, the words of the Act not only give a right to sue, but vest the benefit of all covenants in the chairman. *Alivon* v. *Furnival (f)* contains strong expressions in favour of the plaintiff's contention. *Wolff* v. *Oxholm (g)*, *Story's Conflict of Laws (h)*, and *Copin* v. *Adamson (i)* were also referred to.

PER CURIAM *(j)*. This is not the common case of a public officer suing for a company on a contract made with the company. Here the covenant was made with trustees on behalf of the company. The Victorian Act set out in the declaration enacts that the full benefit of all covenants made with any persons, on behalf of the company, should vest in the chairman. That is equivalent to a declaration that a covenant made with the trustees was in fact made with the chairman. The trustees are only nominal parties, and the chairman may sue on the covenant all over the world. The Act regulates not only the mode of suing but the absolute rights of the parties. Those

(*d*) 16 Q. B. 717. (*e*) 9 C. B. 661. (*f*) 1 C. M. and R. 277. (*g*) 6 M. and S. 92. (*h*) p. 706, last Ed. (*i*) L. R. 9 Ex. 245. (*j*) SIR JAMES MARTIN, C.J., FAUCETT and SIR W. MANNING, JJ.

rights under any contract must be decided according to the law of the place where the contract was made. The declaration is good and the demurrer ought to be overruled.

Judgment for the plaintiff. (*k*)

Attorneys for the plaintiff—*Bradley and Son.*

Attorneys for the defendant—*Iceton and Faithfull.*

HYMAN *v.* BENSON. (*a*)

Promissory Note—Agreement to renew—Warranty of goods for which Note was given—Failure of consideration.

Plea to an action on a promissory note that it was agreed contemporaneously with the making of the note that when the note became due it should not be paid, but should be renewed for three months by a promissory note for a smaller amount, and that the note was overdue when indorsed to the plaintiff. *Held*, a bad plea.

Plea that B. by warranting certain mill-board sold it to the defendant, and that the note was given in part payment of the price, but the mill-board was wholly worthless and unmerchantable, and that the note was overdue when indorsed to the plaintiff. *Held*, a good plea.

DECLARATION on a promissory note for £46 12s. 1d. made by the defendant in favour of one Buhler and indorsed to the plaintiff.

Pleas. 1. That the promissory note in the declaration mentioned was made and delivered by the defendant to the said Buhler in part payment of the price of certain mill-board bought by the defendant of the said Buhler, and that contemporaneously with the making of the said note by a certain agreement in writing made between the defendant and the said Buhler, it was amongst other things agreed that when the said note became due it should not be paid but should be renewed for a period of three months by a promissory note for £30, and that the said note was overdue when it was first indorsed to the plaintiff.

(*k*) The Chief Justice was inclined to think that the opinion expressed by Mr. Lindley was a correct one, and that the chairman of a company authorised by a local Act merely to sue on behalf of the company, could not sue in that capacity in another colony. The following cases were not referred to:—*Trimbey* v. *Vignier*, 1 Bing. N.C. 159; *De La Vega* v. *Vianna*, 1 B. and Ad. 284.

(*a*) March 8.

2. Averment of the same facts as in the 1st plea, and that the note was indorsed to the plaintiff, and that he always held the same without any value or consideration.

3. Averment of the same facts as in the 1st plea, and that the plaintiff at the time of the indorsement to him had notice of the agreement to which the note was subject.

4. That the said Buhler by warranting certain mill-board to be then sound and in good merchantable condition, sold the same to the defendant for a sum of money, in part payment of which the said promissory note was made and delivered, on the condition of renewal in the 1st plea mentioned, yet the said mill-board was not then in sound merchantable condition but was wholly worthless and unmerchantable, and the consideration on which the said note was made and delivered to the said Buhler, as aforesaid, has wholly failed, whereof the said Buhler had notice before the said note became due; and except as aforesaid there never was any value or consideration for the making of the said note; and it was overdue when it was first indorsed to the plaintiff.

5. Averment of the same facts as in the 4th plea, and that the note was indorsed to the plaintiff, and he always held the same without any value or consideration.

6. Averment of the same facts as in the 4th plea, and that the plaintiff had notice of the premises when the note was first indorsed to him.

Demurrer and joinder.

C. J. Manning in support of demurrer. The first three pleas are clearly bad. No tender of the balance or request to renew is alleged: *Flight* v. *Gray* (*b*), *Maillard* v. *Page* (*c*). In the other three pleas there is no allegation of a total failure of consideration. That is necessary to make the bad quality of the mill-board a defence: *Stevens* v. *Wilkinson* (*d*), *Street* v. *Blay* (*e*). Except by special stipulation, a breach of warranty on the sale of specific goods is no defence in an action for the price: *Heyworth* v. *Hutchinson* (*f*), *Bullen and Leak's Pleadings* (*g*). A breach of warranty can only be pleaded by way of cross-action.

Windeyer in support of the pleas. There can be no cross-action against the indorsee, as the goods were not bought from him. In *Maillard* v. *Page*, *Cleasby*, B., says, "If there was a contemporaneous "agreement of such a nature as to prevent the bill, properly "speaking, from being a bill of exchange at all, there would be "a clear defence." That is exactly what is alleged here. In

(*b*) 27 L. J. C. P. 13. (*c*) L. R. 5 Ex. 313. (*d*) 2 B. & Ad. 326.
(*e*) 2 B. & Ad. 456. (*f*) L. R. 2 Q. B. 447. (*g*) p. 267, 3rd Ed.

Gibbon v. *Scott* (*h*) the agreement to renew was altogether contingent. It was the duty of the payee to tender the note for renewal. *Young* v. *Austen* (*i*) is an authority in favour of the pleas, and shews also that the Court will presume the agreement to have been made on good consideration. The plea could only be sustained at the trial by proof of a consideration for the agreement. *Wells* v. *Hopkins* (*j*) was a case like the present. There the delivery of hops inferior to sample was held a defence to an action by an endorsee, on the ground that there was a total failure of consideration. And *Ickerson* v. *Hayes* (*k*) in this Court in 1866 is to the same effect.

PER CURIUM (*l*). The defendant ought to have alleged, in addition to the agreement to renew, a tender of the balance and a request to renew. *Maillard* v. *Page* is conclusive against the first three pleas. In the 4th, 5th, and 6th pleas, the statement that the mill-board was wholly worthless is a sufficient allegation of a total failure of consideration.

Judgment for the plaintiff on the 1*st*, 2*nd, and* 3*rd pleas.*

Judgment for the defendant on the 4*th*, 5*th, and* 6*th pleas.*

Attorneys for the plaintiff—*Curtis and Gannon.*

Attorney for the defendant—*Read.*

FREEMAN *v.* WITHERS. (*a*)

Practice—Demurrer—Right of plaintiff to make up the demurrer-book.

A demurrer set down for hearing by the defendant without any Judge's order was struck out of the paper, and the demurrer-book ordered to be taken off the file.

In this action the plaintiff demurred to the defendant's rejoinder. The defendant, joining in demurrer, gave notice, under Rule 33, that he would contend upon the argument of the demurrer that the plaintiff's replication was bad in substance. Issue was joined on the 10th of February, and on the 22nd of February the defendant set down the issues in law, and gave notice to the plaintiff on the 26th. The plaintiff's solicitors protested,

(*h*) 2 Star. 286. (*i*) L. R. 4 C. P. 553. (*j*) 5 M. & W. 7. (*k*) 5 S. C. R. 158.
(*l*) SIR JAMES MARTIN, C.J., FAUCETT and SIR W. MANNING, JJ.

(*a*) March 8.

and gave notice *by letter* that they would move to strike the demurrer out of the paper. On the case being called on for argument,

Davis (*C. B. Stephen* with him), for the plaintiff, moved to strike out the demurrer. The plaintiff has the conduct of the suit, both as to the issues of fact and the issues of law. The defendant had acted irregularly, and the matter is not properly before the Court.

Darley, for the defendant, objected to the notice as insufficient, being by letter. It was only an act of courtesy, and not a formal notice. The terms of the letter were, "We beg to give you formal notice," &c.

MARTIN, C.J. We think the notice quite sufficient.

Davis referred to Lush's Practice (*b*) and *Crucknell* v. *Trueman* (*c*). The plaintiff, subject to the decision of a Judge, has a right to decide whether he will try the issues of fact or the issues of law first. The defendant by his action deprives the plaintiff of this right. The conduct of the suit is left to the plaintiff, as it is his interest to press it on to a hearing. The plaintiff's right can only be taken away by a Judge on summons after hearing both parties, and not by the mere act of the defendant.

Darley admitted that the plaintiff had the carriage of the demurrer. But the application to strike out came too late, when the demurrer was called on for argument. The plaintiff ought to have gone before a Judge in Chambers, or made an independent motion to the Court. This is a simple question of costs.

PER CURIAM (*d*). The demurrer-book was irregularly made up by the defendant, and the demurrer is irregularly before the Court for argument. It it quite clear that the plaintiff has the carriage of the demurrer, and cannot be deprived of his right by the defendant, except upon the order of a Judge. The demurrer must be struck out of the paper, and the demurrer-book taken off the file. No order as to costs (*e*).

Attorneys for the plaintiff—*Stephen and Stephen.*

Attorneys for the defendant—*Heron and Thompson.*

(*b*) p. 787. (*c*) 9 M. & W. 684. (*d*) SIR JAMES MARTIN, C.J., FAUCETT and SIR W. MANNING, JJ. (*e*) The following cases were cited in the judgment:—*Duberley* v. *Page*, 2 T. R. 291; *Bird* v. *Higginson*, 5 A. and E. 83; *Burdett* v. *Coleman*, 13 East 27.

THE QUEEN *v.* MARY ANN LEWIS. (*a*)

Crown Case.—Evidence not upon Oath.—"Evidence Further Amendment Act, 1876."

A witness, having been sworn, was objected to by a juryman as incompetent. After examination, the Judge decided that he was incompetent, on the ground of want of religious belief, and allowed him to make the promise directed by the Act 40 Vict., No. 8, s. 3, and left his evidence, given after such promise, to the jury. The prisoner was convicted.

Held, that the conviction was right.

Semble, per FAUCETT and SIR W. MANNING, JJ. (SIR JAMES MARTIN, C.J., *dissentiente*), that the section does not extend to objections to witnesses for want of intelligence.

Quære, also, whether a witness is only entitled to take a promise when he objects, on reasonable grounds, to an oath.

The following was the case stated for the opinion of the Court, under the Act 13 Vict., No. 8 :—

"The prisoner was convicted at the last Sydney Quarter Sessions of stealing some money from the person of Charles Henry. The prosecutor was a Kanaka (*b*). After he was sworn in the usual way, and had given his evidence, it was suggested by a juryman that he was not sensible of the obligation of an oath. He was then examined on this point at some length by the Crown Prosecutor and myself, and, amongst other things, stated that he was of the English Church, and could read the Bible in his own language; that he believed that good people went above (pointing upwards), and the bad 'came back again,' and he did not know of any form of prayer. The witness did not seem to understand the questions in respect to these matters put to him, and on the whole I came to the conclusion that he had no idea of a future state, and that therefore he was not a competent witness at Common Law. I accordingly directed the witness to make the promise, in lieu of an oath, prescribed by 40 Vict., No. 8, s. 3, and then he again gave his evidence. I left the case to the jury, but, as it seemed to me that the witness had not any belief in a God, or a future state, I reserved for the decision of the Court, whether I should have allowed the evidence of this witness thus given in pursuance of the Statute 40 Vict., No. 8, to go to the jury, and whether, therefore, the prisoner was rightly convicted.

"W. H. WILKINSON."

(*a*) March 9. (*b*) A native of one of the Pacific Islands.

The section referred to in the case is as follows:—

"Whenever any person called to give evidence in any Court "or before any Justice or other person authorized to administer "an oath whether in a civil or criminal proceeding shall object "to take an oath or be reasonably objected to as incompetent to "take an oath such person shall make the following promise in "lieu of such oath—In the case in which I am now called as a "witness I promise to tell the truth the whole truth and nothing "but the truth. And any person who having made such promise "shall wilfully and corruptly give any false evidence shall be "deemed guilty of perjury."

No counsel appeared for the prisoner.

Foster, for the Crown, was not called upon.

Sir James Martin, C.J. We do not think it necessary to hear Mr. Foster on this point. For myself, I entertain extreme doubts whether the Legislature ever intended by this section to do away with the necessity of giving evidence in Courts of justice on oath. It is very questionable whether the members of the Legislature had that object before their minds in passing this Act or intended to introduce so radical a change. From the earliest times it has been a rule in all civilized communities that testimony in Courts of justice should only be given by persons who made some appeal to the Divinity. In ancient Rome a person was not allowed to give evidence except under some religious sanction. The common experience of mankind has shewn the value of an oath as a safeguard against false testimony. And now an Act has been passed which, as it appears to me, by a kind of side-wind abolishes this principle altogether, and allows any person who objects to take an oath to go into a witness-box, and in the most serious matters, even of life and death, instead of pledging his oath, to make a simple statement. I think the Legislature has been made to do a thing which it never intended. There seems no escape from the conclusion that by the third section of that Act any person who objects (no matter for what reason) must be relieved from the necessity for taking an oath. And in the same way, if a person is reasonably objected to as incompetent, on whatever ground, either for want of religious belief, or want of intelligence or any other ground of objection, he may make a promise and give evidence without an oath. Still, though, to my mind, these consequences were never contemplated by the Legislature, we are bound to interpret the words of the Act in the usual way, and I think the meaning is as I have stated. The evidence therefore was properly before the jury, and the conviction must be upheld.

FAUCETT, J. This Act certainly appears to me to be an encroachment on the principle which has hitherto governed the admission of evidence in Courts of justice in all cases. Formerly witnesses were not competent to give evidence unless they shewed by some religious form or another a belief in a future world and a fear of something after this present life. They were required to be conscious of the feeling of an all-pervading Deity, who would inflict upon them, if they gave false evidence, not merely a temporal punishment, but a punishment taking effect after this life had ended. The fear of a punishment after death is taken away by this Act from a class of persons, and they have only before their minds the *temporal punishment* attached to the offence called perjury. I think it may be a very dangerous principle to introduce; but we have now only to consider what the Statute has said, and to give effect to its provisions, whether we approve of them or not. And first I must guard myself against being taken to agree with his Honor, that any person who merely objects to take an oath can make a promise. My impression is that the word "objects" should be read as if "reasonably" was inserted before it, as it is actually inserted in the 2nd branch of the section. Still I do not decide the point either way, but reserve my opinion until the case arises. There is no doubt that an argument could be based on the fact that "reasonably" occurs in one place and not in the other. As to the other provision in the section, "reasonably objected to" is a very comprehensive expression. A witness may be reasonably objected to on very different grounds, amongst others, the want of religious belief and the want of intelligence. I cannot agree that infants and persons incompetent from want of intelligence are included in the section. If a witness is objected to for the want of rational intelligence, his evidence will still be inadmissible. In my opinion the section was only intended to meet the case of the persons commonly called atheists, or persons without religious belief. The only question for us now is whether the objection was reasonable in this case. I think it was, and that the conviction was therefore right.

SIR W. MANNING, J. I am of opinion that the terms of the Act are clear, and that this case is within the Act, and but for expressions from the other members of the Court, it would not have been necessary for me to say any more than this. I have not the slightest doubt that it was the intention of the Legislature to do exactly what has been done. I have the advantage over my colleagues of having been a member of the Legislature at the time this Act was passed. And this Act is not only the law of the colony, but was adopted, with a few advisable alterations, from an Act in force in England. It may be that it is a

concession to infidelity, and it may be that infidelity is growing side by side with the increased growth of vital religion amongst us. Under these circumstances the Legislature has thought fit to meet the altered state of public opinion. No doubt it is desirable that all evidence should be given upon oath, but it is better to have evidence not upon oath than not to have it at all. It must be remembered that you may have a very great injustice done, and that justice may be denied to the most ardent Christian because the persons who alone could prove his innocence might be incompetent to give evidence on the ground of the want of religious belief. I have no doubt that the Legislature in England, deliberately, and the Legislature here, just as deliberately, have passed this Act with a full regard to its consequences. Of course the remedy for any evils that might arise from its operation is that the evidence will be given subject to observation. The jury will have to consider, among the circumstances under which it is given, the fact that it is not upon oath. No doubt the sanction of an oath is a great help, and with a great number of persons (principally the unconscientious) is necessary to compel them to tell the truth. But, in the view I take, these people will not be excused from taking an oath by the provisions in this Act. At any rate we are bound by the Act, whatever may be our opinions as to its policy. Was the person in this case reasonably objected to? There can be no doubt of that. The objection was made by a juryman, and allowed, after examination, by the Judge. His Honor has expressed the opinion that if any man *objects*, that is to say, refuses, to take an oath, he would be entitled to make the promise given in lieu of an oath. I do not think that "objection" is equivalent to "refusal." It means an objection founded on reasons satisfactory to the presiding Judge. As the point does not arise here I do not intend to decide it, but merely state my present opinion in order that it may not go forth to the public that we are unanimous in taking an opposite view. Of course promises could not be made under this section by children or persons incompetent from want of understanding; the only thing done here is to substitute a promise for an oath. Where an oath could not have been taken from want of understanding before this Act, the same objection would still apply. On these grounds I think the conviction should stand.

Conviction affirmed.

THE QUEEN *v.* HAGGARD AND OTHERS. (*a*)

Crown Case—Jury separating after being sworn in case of Felony.

It does not avoid the verdict of a jury in a case of felony if a juryman after the jury has been sworn and before the prisoner is given in charge is allowed to leave the Court for refreshment. Nor is it an objection to the validity of the verdict that an attorney assisting in the prosecution spoke during the trial to a juryman on matters unconnected with the case.

This was a case stated for the opinion of the Court by W. H. Wilkinson, Esq., Chairman of Quarter Sessions. The prisoners were tried and convicted at the Quarter Sessions at Singleton on a charge of sheep-stealing. A jury was empanelled, and the last juryman called, after being sworn, was allowed to leave the Court for refreshment. He returned, and was re-sworn; the prisoners being allowed a second opportunity of challenging him. The prisoners were then given in charge to the jury. During the course of the trial an attorney who was assisting in the prosecution, by the leave of the chairman, made a communication of a personal nature, and unconnected with the case, to one of the jurymen. The question for the opinion of the Court was whether under these circumstances the verdict of the jury was good.

No counsel appeared for the prisoners.

Foster, for the Crown, was not called upon, but referred the Court on the 2nd point to Hale P.C. p. 508. "If a party after "the jury sworn speaks with a juryman, but nothing touching "the business in issue, this doth not avoid the verdict given "after for him."

PER CURIAM (*b*). The course pursued in allowing the juryman to leave the Court was undesirable. But until the prisoner is given in charge there is no legal objection to the jury separating. There is nothing in the other point.

Conviction affirmed.

(*a*) March 9. (*b*) SIR JAMES MARTIN, C.J., FAUCETT and SIR W. MANNING, JJ.

EX PARTE MARTIN KEARNS. (a)

Practice—No grounds stated in rule nisi.

The Court discharged with costs a rule *nisi* for a prohibition in which the grounds were not stated in compliance with Rule 16, and which did not come within the exception in Rule 17.

On the 5th of March, on the application of *O'Connor*, a rule was granted by SIR JAMES MARTIN, C.J., FAUCETT and SIR W. MANNING, JJ., to shew cause why an order of HARGRAVE, J., dismissing an application for a writ of prohibition should not be rescinded, and a prohibition granted to restrain certain Justices from proceeding further in a conviction of the applicant under the Act 2 Vict. No. 2, s. 10. The applicant was charged in the information with selling two bottles of sarsaparilla at his shop at Wiseman's Creek, on a Sunday. It was contended on the application for the rule *nisi*, that the section under which the conviction took place only applied to towns, and that though the Act 19 Vict. No. 24 was incorporated with the Act 2 Vict. No. 2, the Act 32 Vict. No. 7, which extends the operation of the 19 Vict. No. 24 to all parts of the colony, did not affect the provisions of the 2 Vict. No. 2.

Heydon now moved to make the rule absolute.

Salomons, who shewed cause on behalf of the Justices, took a preliminary objection that the rule did not state the grounds of the application, nor did the grounds necessarily appear on the face of the summons, nor were they stated in any affidavit thereby referred to as containing them, nor had any such affidavit been served upon the other party. The rule certainly referred to affidavits as having been before the Court when it was granted, but not as containing the grounds of the application. It was therefore in violation of the 16th, 17th, and 18th rules of Court.

Heydon. The grounds necessarily appear on the face of the rule *nisi*. They must be the same grounds as were taken before the Judge in Chambers. The respondent was then present, and was fully aware of the grounds. At any rate, the Court will amend, as no injustice will be done to the opposite party.

SIR JAMES MARTIN, C.J. It is quite plain that Mr. *Salomons'* objection must prevail. The 16th and 17th Rules of Court, which apply to summonses in Chambers, are extended by the 18th to rules *nisi* before the Court. Here a rule *nisi* states no grounds and

(a) March 13.

does not refer to any affidavit containing the grounds, and no such affidavit has been served. Hundreds of applications have been dismissed on the same objection as that now taken, and we cannot make a special rule for this case. The application for amendment is made too late.

HARGRAVE, J., and FAUCETT, J., concurred.

Rule discharged with costs.

Attorney for the applicant—*L. F. Heydon.*

Attorney for the Justices—*W. Hellyer.*

CAMPBELL *v.* THE COMMERCIAL BANKING COMPANY OF SYDNEY. (*a*)

New Trial—Damages excessive—Estoppel—Waiver of notice by Mortgagee under the Real Property Act.

A new trial will not be granted on the ground that the damages were excessive, unless they were outrageous, or were calculated on a wrong principle. A person is not by an admission in a deed of an amount due by him estopped from disputing the correctness of that amount when other securities are in question.

A waiver by a mortgagor of all notices to be given by mortgagees under the Real Property Act extends only to mortgages upon the properties of which he is stated in the memorandum of waiver to be proprietor, and not to other properties (though under the Act) included in the same mortgages.

This action was tried before FAUCETT, J., and a jury in February, 1877, and a verdict was found for the plaintiff with £3000 damages. Eight grounds were taken in the memorandum for a rule *nisi* for a new trial, of which three were as follows:—

2. That the damages were excessive.

5. That the plaintiff was estopped by his deed from denying that he was indebted at that date to the bank in the sum of £18,804 3s. 8d., and that the Judge should have so ruled.

7. That the Judge should have told the jury that the waiver of notice by the plaintiff on the 16th day of June, 1871, was a waiver of notice as to all the properties under mortgage.

The action was brought for the sale by the defendants as mortgagees, without legal notice to the plaintiff, of certain wharf property in the city of Sydney, mortgaged by the plaintiff to the defendants. By s. 55 of the Real Property Act a mortgagee

(*a*) March 13.

after default for one month "may give to the mortgagor or "incumbrancer notice in writing to pay the money then due on "the memorandum of mortgage * * * * and that sale will "be effected unless such default be remedied." It was contended that the defendants had given an illegal notice, inasmuch as the sum claimed by them was too large, and also that they had excused the plaintiff from making a tender of the amount actually due on his securities. Among other things the defendants relied on a waiver of notice signed by the plaintiff in the following terms :—

Memorandum. That I, the undersigned, John Campbell, of the city of Sydney, merchant, the registered proprietor of the properties comprised in the two certificates of title under the Real Property Act, registered Vol. xxviii. folio 51 and Vol. xxx. folio 20, do hereby admit and acknowledge that all notices required by the said Real Property Act have been duly given to me by the mortgagees under the two several mortgages notified on the said certificates, namely No. 1607 dated 29th May, 1867, and No. 4503 dated 28th February, 1870.

The wharf property was not included in either of the two certificates mentioned in this memorandum, but was included in the mortgages of the 29th May, 1867, and of the 28th February, 1870. The deed containing as a recital the admission referred to in the 5th ground was an indenture of mortgage of certain jetties attached to the wharf, but did not comprise the wharf property.

M. H. Stephen moved for a rule *nisi* for a new trial. This report contains only such portions of the judgments of the members of the Court as touch the points taken by the 2nd, 5th, and 7th grounds of the memorandum.

Sir James Martin, C.J. The 2nd ground taken in the memorandum is that the damages were excessive. I think there should be no rule on that ground. The Court never grants a new trial where the amount of damages is complained of, unless the damages given were either outrageous, or were calculated on some evidently wrong principle; even although the Court may think that the jury have awarded larger damages than they ought. There is nothing here to shew that the damages in this action were either outrageous or were calculated on a wrong principle. As to the question of estoppel, I do not think that his Honor was at all bound to rule in the way pointed out in the 5th ground. The mortgage deed in which the admission was made related to another property, and not to that for the wrongful sale of which this action is brought. I do not think an admission made by the plaintiff in a deed relating to one property estopped him from

disputing his indebtedness where the action was brought upon transactions arising out of the other securities. It is contended for the defendants that the waiver of notice by the plaintiff, or, more properly speaking, the admission by the plaintiff that he had received all necessary notices under the Real Property Act, extended to the wharf property. Still the memorandum, although mentioning mortgages including the property in question, is pointed only to two certificates for other properties of which he was the registered proprietor. It would be going too far to hold that his admission related to any property other than the two included in the certificates specified at the beginning of the document.

HARGRAVE, J., and FAUCETT, J., concurred.

Rule granted on the 1st, 3rd, and 8th grounds; refused on the 2nd, 4th, 5th, 6th, and 7th grounds.

Attorneys for the defendants—*Want, Johnson and Want.*

CASEY AND WIFE *v.* WENTWORTH AND OTHERS. (*a*)

Admission by Agent—Bank deposit-slip evidence of receipt of money—Agency of Bank authorised to receive payments.

A duplicate bank deposit-slip initialled by a clerk and coming from the possession of the plaintiff is admissible in evidence to prove a payment into a bank authorised by the defendants to receive payments on their account. (Per HARGRAVE, J., and FAUCETT, J.; *dissentiente*, SIR JAMES MARTIN, C.J.)

Per SIR JAMES MARTIN, C.J. A bank intrusted by a person with the duty of receiving money on his account has no authority to bind him by a receipt. An admission not on oath by an agent is only admissible when it is part of the *res gestæ*, or is made in the course of making a contract for his principal.

A distress-warrant of date antecedent to the cause of action was admitted in evidence. *Held* (per HARGRAVE, J., and FAUCETT, J.; *dissentiente*, SIR JAMES MARTIN, C.J.), that it was rightly admitted.

What constitutes sufficient evidence of payment to support the verdict of a jury.

The cases of *Fairlie* v. *Hastings*, 10 Ves. 126, and *Biggs* v. *Laurence*, 3 T. R. 454, observed upon.

This was an action for an excessive distress. It was tried before FAUCETT, J., and a jury in November last, when the jury gave a verdict for the plaintiff for £911 12s. 4d., and specially found, among other things, that a disputed sum of £50 was in January,

(*a*) March 14.

1873, paid by the plaintiff on account of rent to the credit of the defendants into the bank of New South Wales. The evidence on this point was in substance as follows:—A duplicate deposit-slip, bearing date January 10, 1873, signed by the plaintiff and initialled by a clerk of the Bank of New South Wales, was tendered, and after objection admitted in evidence. The clerk was called as a witness for the plaintiff, and admitted that the word "*dup.*" and the initials were in his handwriting, but swore positively that he had not received that sum of money on that day. He spoke from an examination of the books of the bank, and had no independent recollection of the matter. No entry of such payment appeared in the books of the bank, and the clerk (from the fact that the entries in one of the ledgers were in his handwriting) swore that he was ledger-keeper on that day, and could not have acted as receiving teller. Evidence was given that the plaintiff had been directed by the defendants to pay her rent into the bank, to their credit, and that it was the general course of dealing of the bank to give duplicate deposit receipts to persons making payments. It was also proved that the plaintiff had been in the habit of taking these duplicate slips. The plaintiff had no recollection of having paid the money, nor did she know with whose cheque it had been paid. A few days afterwards she wrote a letter to the defendants' solicitor in the following terms:—"I have spent the last quarter's rent in making the house liveable." She explained that she was in great affliction when she wrote the letter.

A rule *nisi* was obtained in December, 1876, on the following grounds:—1. That the verdict was against evidence. 2. That the learned Judge improperly admitted in evidence on the part of the plaintiff a distress warrant of date long antecedent to the cause of action. 3. That the learned Judge improperly admitted in evidence on the part of the plaintiff a certain bank deposit slip as evidence of the payment therein mentioned.

M. H. Stephen and *Windeyer* support the rule. The rule ought to go on the first ground as to the finding of the jury that a payment of £50 had been made in January, 1873. The plaintiff was bound to make out her case, and there is no evidence whatever of a payment. The weakness appears on the plaintiff's own case, as the teller, who is called as her witness, swears he never received the money. His sworn testimony contradicts the evidence (not upon oath) of the slip. Then there is Mrs. Casey's own letter, which puts her out of Court. But the slip was wrongly admitted in evidence. All the cases in which admissions by agents have been given in evidence will be found to be cases of persons generally and continuously employed to transact the

business of the principal. *Biggs* v. *Laurence* (*b*), relied upon by the other side, is practically overruled by *Bauerman* v. *Radenius* (*c*). The distress warrant was also wrongly admitted. It was first tendered to shew that Mr. Fisher would not have acted indulgently if he could have helped it, and was afterwards pressed on the ground that it was some evidence that the goods were in the house. It only authorises the bailiff to distrain upon the goods in the house occupied by Mrs. Casey, and does not specify the goods.

Butler, Q.C., and *Davis* shew cause. The deposit slip is clearly some evidence, though not conclusive against the defendants. *Maclean* v. *Fleming* (*d*) is an analogous case. There Lord Chelmsford (*e*) held that a bill of lading given by the master of a ship is *prima facie* evidence against the owner that a quantity of goods was put on board. [SIR JAMES MARTIN, C.J.: This is a different case. There it is the agent who makes the contract, and the bill of lading is the contract.] It is within the scope of the bank's authority to give a receipt. Any person paying money has the right to demand a receipt: *Benjamin on Sales* (*f*). In *Story on Agency*, s. 138, the case of *Biggs* v. *Laurence* is not treated as overruled. *Garth* v. *Howard* (*g*) is really an authority in the plaintiff's favour. It was there held that a pawnbroker's shopman could bind his employer by a declaration made in the ordinary course of his business. Defendants, by employing a bank which does its business in a particular way, implicitly authorise their business being done in that way. Mrs. Casey explains her letter by saying that she was in great affliction when she wrote it. Rent for two quarters was then due, and she may refer to the rent for the first quarter. Is the negative evidence of the bank books to be set against the positive evidence of the teller's hand-writing on the slip? Even if the verdict is wrong as to the £50, there is no ground for a new trial. The Court would only deduct the £50 from the verdict. They also referred to *Matthews* v. *Haydon* (*h*), *Helyear* v. *Hawke* (*i*), *Weary* v. *Alderson* (*j*), and *Burt* v. *Palmer* (*k*).

MARTIN, C.J. The principal point which has been argued in this case is that set forth in the 3rd ground, viz., that the Judge was wrong in admitting in evidence a duplicate deposit-slip bearing the initials of a clerk of a bank to which the plaintiff was authorised to make payment in respect of rent due to the defendants. By this slip, dated the 10th of January, 1873, it appeared

(*b*) 3 T. R. 454. (*c*) 7 T. R. 668. (*d*) L. R. 2 Sc. App. 128. (*e*) p. 130. (*f*) p. 597. (*g*) 8 Bing. 451. (*h*) 2 Esp. 509. (*i*) 5 Esp. 72. (*j*) 2 M. & Rob. 127. (*k*) 5 Esp. 145.

that £50 was paid in a cheque or cheques by the plaintiff to the account of the defendants. Apart from the slip there was no evidence that that sum was paid into the bank on that day. Mrs. Casey, the plaintiff, was only aware of the payment through the slip, and apart from it had no recollection of that particular sum of £50 having ever been paid. The bank clerk was called, and stated positively on oath (having made a careful examination of the books) that he never received the money on that day. There was therefore no positive evidence on either side as to payment, and it becomes most material to consider whether the slip was rightly admitted in evidence. After a full consideration of the arguments, I have come to the conclusion that his Honor Mr. Justice *Faucett* was wrong in admitting it. The true principle which governs the admission of evidence of this kind is laid down in *Fairlie* v. *Hastings* (*l*) by Sir *William Grant*, one of the most eminent Judges that ever sat in any Court, and his observations have been often referred to and followed in later cases. He says:— "As a general principle, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly within the scope of his authority, bind his principal by his agreement: and, in many cases, by his acts. What the agent has said may be what constitutes the agreement of the principal: or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore if writing is not necessary by law evidence must be admitted to prove the agent did make that statement or representation. So with regard to acts done the words with which those acts are accompanied frequently tend to determine their quality. The party therefore to be bound by the act must be affected by the words. But, except in one or other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent." And again:—"The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent it is to be proved by his testimony,

(*l*) 10 Ves. 126.

not by his mere assertion. Lord *Kenyon* carried this so far as to refuse to permit a letter by an agent to be read to prove an argument by a principal: holding that the agent himself must be examined: *Maesters* v. *Abram* (*m*). If the agreement was contained in the letter I should have thought it sufficient to have proved that letter was written by the agent: but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." He then observes on the case of *Biggs* v. *Laurence*, which is now cited by the counsel for the plaintiff as a leading authority in his favour, in the following terms:—"This doctrine was discussed incidentally in *Bauerman* v. *Radenius* (*n*), and in that case there is a reference to another (*Biggs* v. *Laurence*), in which Mr. Justice *Buller* held that a receipt given by an agent for goods directed to be delivered to him might be read in evidence against the principal. The counsel in *Bauerman* v. *Radenius* state that the contrary had been frequently since held by Lord *Kenyon* at Nisi Prius without its having ever been questioned. That statement does not appear to have been denied upon the other side, and seems to have been acquiesced in by Lord *Kenyon*, who said—'that was not the point upon which the case was argued or determined'—meaning the point that such a receipt could be admitted in evidence." Here we see that a great Judge and a most clear-headed man lays down that what an agent says not upon oath is only admissible either as part of the *res gestæ* or as part of an agreement made by the agent. It is quite clear that the case relied on for the plaintiff is not law. It was departed from by the same Judge shortly afterwards, and has never since been acted upon. As is pointed out by Mr. Starkie (*o*), the marginal note is erroneous, as there is nothing in the case to shew that the person giving the receipt was an agent to buy goods. Looking at what was said by Mr. Justice *Buller* himself (then Lord *Kenyon*), in *Bauerman* v. *Radenius*, and by other Judges, I have no doubt whatever that *Biggs* v. *Laurence* is not law, and ought not now to be acted on. In *Garth* v. *Howard* (*p*) it was held that the declarations of a shopman, unless made in the course of his employer's business, are not evidence against the employer. In that case reference was made to *Fairlie* v. *Hastings*, and we have the opinion of another great lawyer, Lord Chief Justice *Tindal*, that it "may be regarded as the leading case on this head of evidence." *Biggs* v. *Laurence* was again referred to in *Kahl* v. *Jansen* (*q*), and was not acted upon. The true rule is that laid down by Sir *William Grant*, that where a person employs another to make a contract,

(*m*) 1 Esp. 375. (*n*) ubi supra. (*o*) Starkie on Evidence, Vol. II. p. 31. (*p*) 8 Bing 451. (*q*) 4 Taunt 565, and see also *Langhorn* v. *Allnutt*, 4 Taunt 511.

what the agent says in making the contract or in the negotiations leading up to it, is admissible in evidence against the principal. But here there is no question of contract at all, and an agent to receive money or goods cannot bind his principal by his admission. A person who is authorised to receive money across a counter is in altogether a different position from the master of a ship. His duties are entirely passive; he is not required to do or say anything; nor can he be said to make a contract for the principal in any way. The owner of a ship makes the contract of freight through his master, and it is only because the master is his agent for the purpose of making the contract that his admissions are evidence against the owner. His receipt for the goods is part of the contract of carriage which he is authorised to make. It will be found on examination that all the cases where statements by agents have been held to bind their principals came under the two classes of cases mentioned by Sir *William Grant*. It would be going altogether too far to hold that what a mere clerk in a bank chooses to write upon a deposit-slip should be evidence against customers of the bank. I adopt the concluding words of Chief Justice *Tindal's* judgment in *Garth* v. *Howard*:— "Evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it." It commends itself to the common sense of everyone that such evidence should be kept within the strictest limits. Suppose the case of a fraudulent clerk who made admissions of this kind and then left the country. To allow them to be given in evidence would be a most dangerous step. The bank itself is not the defendant's agent for making an acknowledgment of this kind. I think that on this ground there ought to be a new trial, as I cannot see that the jury did not take the £50 into account in estimating the damages. A jury will probably make the damages they award bear some proportion to the amount of the excess of the rent distrained for over the rent actually due, but we cannot say what the proportion has been in this case. On any compulsory sale goods are almost certain to be sacrificed, and the goods sold to satisfy £50 may, in the opinion of the jury, have been worth considerably more. It is therefore impossible to tell what portion of the damages the jury gave in respect of this sum of £50. Another ground taken in the rule *nisi* is that the finding of the jury that the £50 was paid is against evidence. I think the jury were wrong. The plaintiff had to make out her case; and apart from the slip there was no evidence at all of payment. If there had been *any evidence at all* that the money was paid in, however improbable Mrs. Casey's story might have been, I should have thought that the rule this Court follows, when there is evidence on both sides before the

jury, ought to be acted on and a new trial refused. But if the deposit-slip was wrongly admitted, there was no evidence of payment before the jury, and their finding was manifestly wrong. It is said that the bank-clerk in denying that he received the money only spoke from the bank books. But how else can a bank-clerk speak? The law does not require impossible evidence, but only the best evidence procurable in each case, and bank clerks whose transactions are numbered, not by hundreds but thousands, cannot be expected to speak otherwise than from the entries in the books, except in the case of some particular matter which would be likely to impress itself on their memory. I also think that his Honor was wrong in admitting in evidence a distress-warrant which had been issued on a former occasion by the defendants. It was put in for the purpose of proving the plaintiff's ownership of the goods in question in this action, and I do not think it was evidence for that purpose. However, as her ownership was abundantly proved *aliunde*, the point becomes unimportant. I think the rule ought to be made absolute for a new trial, but as the other members of the Court are of a different opinion, the rule must be discharged with costs.

HARGRAVE, J. The third ground in this rule is that the Judge improperly admitted in evidence on the part of the plaintiff a certain bank deposit-slip of date 10th January, 1873, as evidence of payment of the amount therein mentioned. This raises a very important question for our decision, but I am quite satisfied that Mr. Justice *Faucett* was right in admitting the deposit-slip, and that such admission is justified on the old authorities that have been referred to, which establish that an agent acting in the scope of his authority can bind his principal by an admission. What is the effect of *Fairlie* v. *Hastings* and the other old cases? They lay down general principles, which have to be applied to particular cases as they arise. Everyone knows that they are thoroughly good law—no one disputes that. But that decision was in 1804, and since that time banking business has increased fifty-fold, and Mr. Justice *Faucett* has rightly applied to banking transactions as they exist at the present day the principles quite rightly laid down in the old authorities. The Judges in those days had to apply the law to circumstances as they then existed, and we have to do the same now in a new state of circumstances. If such a document as this deposit-slip is not to be received in evidence, what is to be done? All business in Sydney is carried on through the banks: most payments are made through the banks: and generally speaking the only protection a person has when paying money is such a deposit-slip. If such a receipt is not evidence, what is everyone to do? Is a person when making

a payment at the bank to wait till the clerk tells him that he has entered the amount to the credit of the payee in the ledgers? Such a thing is preposterous; and to refuse to receive those slips in evidence is ridiculous at the present day. It would upset the whole manner of doing business. Lord *Kenyon* may have been right in saying in *Bauerman* v. *Radenius* that it was his wish and comfort to stand *super antiquas vias*, but we have not only *stare* but *ire*—not only to stand upon the old ways, but to *walk in them*, by adapting the general long-established principles of law to a new and altered state of circumstances. I therefore think that the evidence was rightly admitted, and that it was a very important piece of evidence. Then it is said that the finding of the jury that the £50 was paid was against evidence. I think it was nothing of the sort. A great deal was made of the fact that there was no entry of this payment in the books of the bank, but the jury thought, quite properly, that the omission of the bank clerks to recollect or enter the amount goes for nothing against their deliberate acts in the course of their regular employment. Then the jury had an opportunity of seeing the demeanour of Mrs. Casey in the witness box. She said she had found the slip in its present state, and that it bore her signature, and the jury believed, as they had a perfect right to, that she had not been guilty of fraud or forgery. I think they were quite right, and I should have given exactly the same verdict myself. As to the letter, I do not put the construction on it which has been contended for. I do not read it as saying that Mrs. Casey had spent the £50 in repairs, or that she had actually spent the last quarter's rent (which was not £50), but that she had expended on the repairs an amount which would be equal to a quarter's rent. But she does not say she had not been able to make any payments, and it is quite consistent with that letter that she had paid the £50 into the bank only a fortnight before. As to the other point taken, I think Mr. Justice *Faucett* was quite right in admitting in evidence the distress-warrant. I always myself at Nisi Prius act on the principle of letting in all evidence that has any reference to the subject matter of the action—everything having taken place at any time between the parties and relating to the cause of action—*inter partes ad rem*. The fairest way of getting at the truth is to let in all evidence of that kind, and to let the jury have before them all the dealings of the parties with each other. On these grounds I think that the verdict of the jury was right and ought not to be disturbed, and that the rule should be discharged with costs.

FAUCETT, J. I think the distress-warrant was rightly admitted by me. If it had not been originally tendered for another

purpose there would probably have been no question about its admissibility. I think it was clearly evidence for the purpose of shewing the identity of the property distrained upon. At any rate, even if it was improperly admitted, the admission was immaterial, as the plaintiff's possession of the goods was abundantly proved. The next point is more important, whether the deposit-slip was rightly allowed to be put in evidence. With all respect for the *Chief Justice*, I think it was properly admitted, and that it was admitted at the proper time. Evidence had then been given of the general course of dealing of the bank in receiving money, that their practice was to keep one deposit-slip and give the other to the customer with the word "duplicate" or an abbreviation of it signed with the initials of the teller at the counter written across the slip. But further than this, it was proved that in this particular case Mrs. Casey was in the habit of paying in money and receiving these duplicate deposit-slips, and that the account of the defendants was made up and communicated to them, after receiving money on their account in this way. In my opinion it would be getting rid of all principles of evidence or the law of agency if under these circumstances we excluded such a receipt. His Honor has referred to several cases, but I cannot see that these cases have anything to do with the present point. In *Biggs* v. *Laurence* there was no evidence of the general course of dealing of the buyer and seller with each other through their agent, nor was there evidence, as in this case, that the course of dealing of the agent had been sanctioned by the principal. As to *Fairlie* v. *Hastings*, the question is whether this case comes within the *principle* of that decision. Sir *William Grant* there lays down a general principle, but do we expect to find him stating every instance that can possibly come within the principle? Does he leave no room for the expansion of that principle in its application? In my opinion, the effect of the decisions has been to establish the principle that when a statement is made by an agent *not in the course of dealing*, it is inadmissible. It must refer to the particular contract or the particular dealing in question. But it would be a most serious construction to put upon the general principles laid down by different Judges on this point to confine it to the case of contracts. Sir *William Grant* stated some exceptions which infringe upon the rule, but does he say that it cannot be infringed upon in a case like the present, when evidence had been given of the general course of dealing of the bank, of the particular course of dealing with Mrs. Casey, and of the sanction of the defendants to the course of dealing of the bank? I still think that the slip was properly admitted. The question then arises whether there was sufficient

evidence to justify the verdict of the jury. Certainly evidence derived from an examination of the books is very strong, and I should be very sorry to say anything to weaken it. But look at the whole evidence on this point as it stands. Mrs. Casey was in the habit of getting documents of this kind. Then there is the conduct of the teller; that must be just as binding as the conduct of the board would be. The teller says these are his initials, and that the abbreviation "*dup.*" is in his handwriting. He says he must have written it, and that the slip must have passed through his hands. Are we to assume, or should the jury have assumed, that he went through all this without receiving the money? I might have thought that, taking all the evidence together, it would have been safer to find that the payment was not made; but am I to say the verdict was wrong? The slip, in my opinion, was strong evidence of payment, and the only question is whether it was effectually cut down by the defendants. The jury may have said, "There is something wrong somewhere, but as Freeman (the clerk) says that it must have passed through his hands, we must assume that he signed it in the usual course." I must say the letter struck me very forcibly, and I commented strongly on it to the jury. Taking it in its natural meaning, and not giving it any forced construction, I should have thought it overwhelming, had I been called upon to decide the question. But where the fact of payment or non-payment is involved in mystery, so that we cannot ourselves give a positive answer, are we to say that the verdict of the jury was wrong and grant a new trial?

Rule discharged with costs.

Attorneys for the plaintiffs—*Ellis and Makinson.*

Attorney for the defendants—*Barker.*

EX PARTE READ AND WHITE. (a)

Prohibition—Vagrant Act—"Enclosed Yard"—"Unlawful Purpose"—Costs.

A person who has horses not belonging to him in a stockyard is not there for an unlawful purpose within the meaning of the 3rd section of the Vagrant Act (15 Vict. No. 4).

A stockyard in a remote place in the bush is not "an enclosed yard" within the same Act and section (per SIR JAMES MARTIN, C.J., and SIR W. MANNING, J.; *dissentiente*, HARGRAVE, J.).

Salomons moved to make absolute a rule *nisi* granted by SIR JAMES MARTIN, C.J., in Chambers, calling on certain persons to shew cause why a writ of prohibition should not issue, to restrain them from further proceeding on a conviction of the applicants for being in a stockyard on the dividing range between Bingera and Pallal runs for an illegal purpose, "to wit having horses not belonging to them in the said yard," and why the said conviction should not be set aside, and the applicants discharged from custody, and why the respondents should not pay the costs of the application. The applicants had been sentenced to four months' imprisonment with hard labour in Tamworth Gaol. The warrants of commitment were headed "Vagrancy—15 Vict. No. 4." The material evidence appearing by the depositions was as follows:—

Richard Holmes: I saw both the defendants on February 8th on the dividing range between the Horton River and Hale's Creek. They had some horses in a yard, and were looking at them. The slip-rails of the yard were up. There were three head of horses in the yard. There were two horses with saddles and bridles on—one was tied up near the yard and the other a few yards from the yard in a break. They appeared to me as if after having a gallop—they were sweating. I saw the defendants leave the yard; they rode the two horses. Mr. Gulland asked the defendants their names, but they made no reply. The yard is about four miles from the track going from Bingera Station to the Horton River. The horses in the yard were sweating when I first saw them; they appeared as if they had been recently run into the yard. The horses were blowing at the time. When I first went up to the yard White was standing inside the rails, and Read was in the yard turning the horses round. Both defendants looked warm.

Louis Gulland confirmed the evidence of Holmes.

(a) March 13.

The grounds taken in the rule were:—1. That there was no proof before the Justices that the applicants or either of them were in the said yard for any unlawful purpose. 2. That the charge against the applicants on which they were convicted is not an offence, nor is the yard a yard within the meaning of the Act 15 Vict. No. 4, or any other Act. 3. That the applicants having horses not belonging to them in the said yard is not an unlawful purpose within the meaning of the Act 15 Vict. No. 4.

Davis, who appeared for Gulland, the prosecutor, to shew cause on the question of costs only, was not called upon.

By 15 Vict. No. 4, s. 3, "every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any enclosed yard, garden, or area, &c., shall be deemed a rogue and vagabond."

SIR JAMES MARTIN, C.J. The evidence was that the yard was a stockyard on an unfrequented part of a station four miles from the nearest track. The Act in question should be strictly contrued: *In re Jones*, 7 Ex. 588, per POLLOCK, C.B. A yard, to come within the Act, must be a yard in connection with some of the buildings mentioned. At any rate, there is no evidence that the applicants were there for an unlawful purpose. The conviction must be set aside, but, as there were circumstances of suspicion, without costs.

HARGRAVE, J. I think the stockyard is a yard within the meaning of the 3rd section of the Vagrant Act. But the conviction does not sufficiently disclose any illegal purpose. The prohibition ought to go, but as the Justices made the mistake in convicting the applicants, no costs should be given against the prosecutor.

SIR W. MANNING, J. I concur with the *Chief Justice* that the word "yard" must be taken in connection with the context, and that the stockyard in this case was not a yard within the meaning of the Act. There was no evidence of any unlawful purpose. The prosecutor should not have to pay costs occasioned by the erroneous judgment of the Justices.

Rule absolute for a prohibition without costs. Order that the applicants be discharged from custody.

Attorneys for applicants—*Spain and Sly.*

LAING AND OTHERS *v.* BAIN AND OTHERS (*a*).

Statute of Limitations—Evidence of Possession—Effect of partial Occupation.

In an action of ejectment it was proved on behalf of the defendants that one W. occupied a portion of the land claimed, an area of 2560 acres, that he built a house upon it, cultivated a few acres, split timber upon, and allowed his cattle to run over, the whole land, and stated that he intended to occupy it. There was no evidence that the boundaries were marked, or that witness knew where they were. The jury found a verdict for the defendants. *Held*, per SIR JAMES MARTIN, C.J., and HARGRAVE, J. (*dissentiente*, FAUCETT, J.), that the verdict could not be supported.

What are sufficient acts of possession to make out a title under the Statute? *Quære.*

EJECTMENT. This action had been twice tried; first before FAUCETT, J., in May and August, 1876, when a verdict was found for the plaintiffs. The Full Court afterwards, on the 8th March, 1876, set aside the verdict and granted a new trial on the ground of misdirection. The action again came on for trial in November, 1876, before FAUCETT, J., and the jury found a verdict for the defendants. In December, 1876, a rule nisi for a new trial was obtained on the ground that the verdict was against evidence. This rule now came on for argument.

The action was commenced in February, 1874. The plaintiffs claimed as the representatives of the original grantees in 1840, and their title was fully proved. The defendants had acquired the property, some by transmission, others by purchase. They all claimed through one Worrell, who was alleged to have gone into possession in 1851 and 1852, and it was contended on their behalf that the plaintiffs were barred by the Statute of Limitations. As to the date of Worrell's possession there was conflicting evidence, which, from the view taken by the learned Judges in their judgments, it becomes unnecessary to detail. But the evidence of the defendants' witnesses, shewing the nature of Worrell's occupation before 1854, was as follows:—

John Bourne: Worrell was living at Redbank in 1851. I always found him there whenever I went: he was splitting and cultivating. He had a house on it. He was growing maize in 1852. I went through it with him. It was three feet high. Some of the land at Redbank was agricultural, some bush land. I cannot say whether Worrell slept in the house. I cannot say whether the maize was in an enclosed paddock, or how much land was under maize. I saw cooking utensils at the house. There

(*a*) March 15.

were more than two acres under cultivation, perhaps more than five.

Frederick Litchfield: I have seen Worrell at other places besides Redbank cutting timber. I have seen his boat at several places about the river. Wherever he saw a nice bit of timber he would go and get it. I saw Worrell two or three times at the hut; it was built of slabs.

William de la Fosse: I know old Worrell. I saw him at Redbank in 1852. I went there for some staves for tallow casks. I got them from him. He was living there then in a hut. I always went to his hut when I went there to get a cup of tea. I saw some bullocks there, and one or two cows. I do not know how many cattle Worrell took there. He put up a skillion to his hut. He used to cultivate a bit of land there, and get staves and split. I did not see Worrell splitting. There was no wharf erected at his place; it was only a natural one.

James Batler: I know Redbank. I went there in 1853. I purchased corn from Worrell there. Worrell was on the ground, and there was a house.

Thomas Mumford: I was there in 1853. I saw old Worrell there splitting shingles. He had a bit of a house. I had dinner with him and with his boy and girl. I saw some cattle there feeding about. I cannot say how many.

James Palmer: I saw Worrell at the hut in 1852. I saw him looking after the cattle there. The cattle were running all over the place. There was not a large quantity of cattle, 10 or 20 perhaps.

James Worrell: I remember going to Redbank when I was a little boy. I found a hut there. Before I went to live there I saw my father working at the place. He took some young bullocks and cows with him—no broken-in bullocks. I used to go after the cattle; I remember just the remains of an old fence. I used to be after cattle there. That is not far from the back boundary of the land. The cattle used to go all over it. I heard a party named Walsh asking my father permission to cut timber on the land and take it away. He said he could. My father had 20 or 30 head of cattle altogether. I recollect some milking cows and two or three young bullocks. My father built the hut that he afterwards lived in. We got the timber for the hut off Redbank. I do not know how many acres of land my father cleared—between 30 and 40 acres. Part of the cultivated land was fenced. I do not know when he cleared it.

Charles Worrell: When I recollect first, my father and my brother and sister were living there. I am 28. My father used to split shingles and cultivate a small portion of land. I can't

say how many acres—not more than 8 or 9 acres, when I first recollect. He had cattle there running over the property. I was present when my father put some people in possession. I helped to make out the lines.

James Florence McCarthy: I am a Police Magistrate at the Bellinger River. I know the Redbank estate: I saw old Worrell there in 1850 and 1851. No one else was then living on the estate to my knowledge. As far as I could see he had 30 or 40 acres in cultivation, and 30 or 40 head of cattle running over the whole. We used to take our cattle off the place and leave Worrell's cattle there. I never saw anyone else in occupation there. Cutting timber was Worrell's principal occupation. I knew that the property belonged to Major Mitchell. I understood so from Worrell. He said he occupied, and meant to. Nearly all the neighbours' cattle used to run over this land. I have met persons collecting cattle off the place in the same way as I did. I never heard of these cattle being impounded by Worrell: there was no pound in the district. I never knew him to order people off. The fences were down, and other people's cattle were there. They took them away, and I took ours away; Worrell's remained.

M. H. Stephen and *Sir G. Innes* in support of the rule.

Butler, Q.C., *Windeyer*, and *Donovan* shew cause.

Sir James Martin, C.J. This was an action of ejectment brought to recover possession of 2560 acres of land on the River Hastings, by persons representing the original grantees. The legal title of the claimants to the property was clearly made out at the trial. It appeared that neither the original grantees, nor any of the persons claiming under them, had ever been in possession of this land. But the mere fact of their having never been upon the land would not prevent them from recovering against the persons at present in possession, unless some one more than twenty years before, had gone into possession. The action was brought in February, 1874; and therefore persons relying on the Statute of Limitations must have shewn a possession before February, 1854. No acts of possession after that date would enable the defendants to resist the plaintiffs' claim. In this case the defence was solely and entirely the Statute of Limitations. There was no pretence of any lease or conveyance to the persons under whom the defendants claimed: they were entirely without title. Their case was that the right of the plaintiffs to bring an action had accrued more than 20 years before the action was brought, and that therefore they were now barred by the statute from recovering the land. Now, if these defendants had been claiming by virtue of a conveyance from

the grantees, it would have been necessary for them to shew that there had been a conveyance fixing with certainty the area and boundaries of the land. We all know that any deed conveying land, where the description is unintelligible, and does not mark out clearly the boundaries of the land conveyed, goes for nothing. The descriptions of the parcel would have to be such as would enable anyone to identify the land. In that case, therefore, precision would be necessary. And in my opinion that precision is no less necessary in the case of a person who claims by mere occupancy, who has paid no money for the land, and who holds no formal transfer. The defendants in this case say that prior to 1854 a person named Worrell went upon the land and took possession of it—that he went there in 1851, and took his family with him. Evidence was called for the plaintiffs to shew that he was not there at that time, but I put out of consideration any conflict of testimony. At this stage of the action, when the verdict of the jury has been for the defendants, it would be going against our former decisions and the practice that has prevailed in this Court for some years, to set aside that verdict if there has been evidence both ways, even though we should think that the jury have come to an erroneous conclusion. If the sole question for the jury had been whether Worrell was there in 1851, I would have thought, as there is a conflict of evidence on the point, that it would not be in accordance with the rule which this Court has been in the habit of following, to interfere with the decision of the jury. But that was not the real question in the case. It was necessary for the defendants, to entitle themselves to the verdict, to shew, not only that Worrell occupied *a portion* of the land claimed, but that he occupied *the whole* of it. I go the whole length of Mr. *Stephen's* argument, that defendants, when they rely upon the Statute of Limitations, must thoroughly make out their case. It is not to be left to doubt or surmise where Worrell went, when he went, and what were the boundaries of his occupation. All these matters must be *proved*. If the defendants relied on a conveyance, they would be bound to shew the identity of the boundaries of the land claimed with the boundaries described in the deed, and with equal reason they are bound to shew with the same precision when claiming by occupation, how far that occupation extended. Here the land in question is a large area, 2560 acres; it has a frontage of a mile to the River Hastings, and goes back 4 miles, a very long distance. There is absolutely no evidence that the side lines or the back line were ever fenced, so as to constitute this large piece of country an enclosure. Certainly it appeared in evidence that cattle went into the land because "the

fences" were down, and that Worrell's cattle grazed up to the remains of an old fence; but there was nothing to shew that it had been a boundary fence, and the statement is far from amounting to evidence that the boundaries were fenced. And this introduces a difficulty. There is no doubt that it is easy to determine the question of occupation in the case of a house, or a garden surrounded by a wall, or a small paddock, or even a larger paddock if it is cleared and enclosed and the country is well ridden over. But as the area becomes larger the proof becomes more difficult, and a larger amount of proof is required. For instance, in the case of a large grant like that of the Australian Agricultural Company, which reaches nearly from Murrurundi to Tamworth, would it be contended that, because a person squatted down in one corner near Murrurundi, his possession extended all the way to Tamworth? No doubt an inference may be drawn from the fact of a person occupying a portion, but that inference depends for its force on the circumstances of each particular case, one of the most important of which is the extent of the land which he claims to occupy. It is not enough, if a man wishes to occupy a garden, to take possession of one bed; there must be some act which is equivalent to putting the owner out of possession of the whole. The trespasser must in some way or other assert his right of control over the whole. If the property was a large paddock he might graze his stock over it and exclude other persons from using it. In the present case the land in question was bush land, unenclosed forest country; and it is absurd to say that a person by going to an old house in one corner, living there, and saying that he intends to take possession of the whole, can oust the real owner. This is not enough—he must do something. A statement of his intention is not sufficient—he must take some steps to exclude other people. It appears that one person was warned off, but that was in 1857, at a period too late for the purposes of this defence. But even if it had happened in 1854, it would have only proved an occupation of that particular spot. An isolated instance like that would not be sufficient to shew a general occupation. Then there is evidence that Worrell knew, or said he knew, that the place consisted of four sections. But there is not one tittle of evidence that he knew the boundary lines, or that he ever in any way asserted his possession up to any one of the boundary lines set out in the writ. The whole evidence for the defendants was that Worrell went upon the land in 1851 or 1852, that he lived there, that he had about 40 head of cattle there, and that he cultivated 8 or 9 acres. But it was necessary, before there could be a verdict for the defendants, that the jury should have had before

them some evidence that the occupation by Worrell extended up to the boundary lines. There is no doubt that, as to portion, the jury would have been justified in finding a verdict for the defendants; but they have given a verdict in their favour as to the whole. This is not the case of a conflict of evidence, but of a verdict without any evidence to support it. The law in my opinion requires much greater precision in a defence of this kind. If a person wants to avail himself of the Statute of Limitations, he must *do something* to shew that he is occupying a particular piece of land with defined boundaries; he must either put up fences, if there are none; or repair them, if they are broken down; or mark trees to shew his boundaries; or warn people off the land; at any rate, he must do some act from which people may see what he intends to occupy. I am clearly of opinion that the verdict of the jury was wrong, and that a new trial ought to be granted.

HARGRAVE, J. I concur altogether that the verdict in this case cannot be supported at all. I will never interfere with a verdict where there has been a conflict of evidence, and where the jury have had materials before them on which they could lawfully find their verdict. But here, putting out of consideration the whole of the plaintiffs' evidence in contradiction of the case made by the defendants, I can clearly see that the evidence for the defendants, standing by itself, is not sufficient in law. I agree with his Honor that a title under the statute is to be governed by the same principles as apply to conveyances, as to the certainty of the boundaries of the land occupied. And a defendant is bound to put before the jury circumstances of occupation clearly applicable to the extent said to be occupied. He must shew an occupation of the whole. But what are the facts in this case, as they appear in the evidence? Instead of having all the cattle necessary to occupy 2560 acres, Worrell had only 10 or 20 or 30 head. Even if these few cattle had been turned loose to breed an increase, it might have shewn some intention of occupying the land with them; but it is in evidence that they were only working bullocks and milkers. As regards the extent to which they went, we have only the wretched evidence of a boy that they used to graze up to some old fence. But this is insufficient. There must be not merely negative evidence, such as that the cattle were allowed to graze over the land, but it must be shewn positively that their owner put them there and fed them right up to the boundaries of the land he claimed. But here he does absolutely nothing which would shew the owner of the land, if he came there, that some one else was in occupation. His acts of possession should be such as would

open the eyes of the grantee, if he saw them, to the fact that some one was trespassing on his property. As to the conversation between Worrell and different men, they are perfectly ridiculous. They are not acts of possession at all. Nor did he repair the fences. And instead of going into the stone house which was there, he put up a hut. If he had taken possession of the house belonging to the property, that might have been some evidence of an intention to take possession; but he does not. On the whole, taking the defendants' evidence at its maximum strength, and taking into account every word that is said in their favour, I think the verdict altogether unsupported. Are we to let it go forth to the country that upon such evidence as this persons are liable to be ousted from large and valuable estates? I entirely concur in the propriety of the decision of this Court in *Illidge* v. *Leary* (*b*), and think that titles under the Statute of Limitations are not to be supported by the verdict of a jury, unless the evidence is just as precise in every way as it is required to be in the case of documentary titles. Another ground for granting a new trial would be that the property is very valuable, and that the jury on the first trial found a verdict for the plaintiffs.

FAUCETT, J. I think the judgment of their Honors will probably do substantial justice in this case, and therefore I am sorry that I cannot agree with them. According to the principles which usually govern this Court in granting or refusing new trials on the ground that the verdict is against evidence, I think this rule ought to be refused. The trial lasted seven days, and all the evidence was most fully commented on to the jury. The only question now is whether the evidence of possession was sufficient to oust the original grantees from their property. It has been said that there is no evidence that the land was enclosed by lines of fences. In my opinion it was just as well marked out as if there had been fences. It was bounded on all sides by neighbouring properties, which were occupied, and was well known, and well marked out. Under these circumstances Worrell went there. There was a great deal of evidence on both sides to shew when he went there, but I need not refer to it, because on that point I am quite clear that the verdict cannot be disturbed. So far I think the verdict was right, but when we go beyond that I think the verdict was wrong. The question was whether Worrell had possession of all that large territory. If there had been no evidence of such possession, I would have agreed with their Honors in their conclusion. But

(*b*) post appendix.

the jury had evidence before them, and I drew their attention pointedly to the distinction between occupation of a portion and occupation of the whole. When, notwithstanding this, the jury found that the old man was not only in possession of a portion, but of the whole, how are we to set aside their verdict? I cannot altogether assent to the proposition that a person must put up a notice, or fence the land, or warn off trespassers, so as to give some intimation of his possession to the rightful owner. It does not seem to me necessary in point of law. Whether necessary or not, it was certainly not done in this case. Nor do I think it necessary that the land should be occupied with a great number of cattle. But the evidence of occupation in each case must depend on its particular circumstances. The building of a hut would seem to be strong evidence of an intention to occupy, unless it were clearly done for a temporary purpose only. If I had not drawn the attention of the jury not only to the necessity of there being an intention to occupy as well as an actual occupation, or had not told them that the intention in itself was useless and worthless unless it had been accompanied at the earliest stages with acts of occupation, I would have concurred with their Honors in granting a new trial. Now, though I would have come to a different decision myself, I cannot say that there is no evidence to support the verdict of the jury. Take the evidence of Mr. McCarthy alone, a most respectable and intelligent witness. In my opinion his evidence shews an occupation of the whole by Worrell. He says he saw cattle kept by Worrell all over the ground, and that all the neighbours took their own cattle off the land when they strayed there, and did not interfere with Worrell's. That may be taken as an admission by them that Worrell was in occupation. I pay no regard to the evidence that Worrell was splitting on the ground, because there was evidence that he split anywhere he could get timber. As I said before, I am glad that their Honors have come to the conclusion that they have come to, but for the reason that the attention of the jury was most pointedly drawn to all the evidence, I cannot concur in that conclusion. I should have been more inclined to grant a new trial on the ground that this is a very important case, and concerns a large and valuable property.

Rule absolute for a new trial. The costs of the previous trials to abide the event. It was made a condition that the evidence of the witness McCarthy, who had died since the last trial, should be read in the new trial for the plaintiffs from the Judge's notes.

Attorneys for the plaintiffs—*Want, Johnson and Want.*

Attorney for the defendants—*R. B. Smith.*

OWSTON *v.* THE BANK OF NEW SOUTH WALES. (*a*)

Malicious Prosecution—Corporation—Evidence of Agency—Authority of Manager of Bank.

The Bank of New South Wales is a joint stock company incorporated by a private Act, 14 Vict. *Held* (per HARGRAVE and SIR W. MANNING, JJ.; *dissentiente*, SIR JAMES MARTIN, C.J.), that an action of malicious prosecution may be maintained against the bank.

Held, also (*dissentiente*, SIR JAMES MARTIN, C.J.), that the acting manager of the bank had an authority implied by law to bind the bank by his acts, and that the bank was liable for a prosecution instituted by him.

As to the liability of the bank for the acts of their general solicitors prosecuting without special instructions. *Quære.*

This action was tried in May, 1876, before SIR W. MANNING, J., and a jury of four, and a verdict was then given for the plaintiff with £500 damages. On the 6th of June, 1876, on the motion of *Butler*, Q.C., on behalf of the defendants, a rule *nisi* to enter a nonsuit or for a new trial was granted. The rule came on for argument in September, 1876.

Butler, Q.C., and *Davis* supported the rule. *M. H. Stephen* and *Knox* shewed cause.

The facts, arguments, and cases relied upon are stated at length in the following judgments, and the terms of the private Act incorporating the Bank of New South Wales appear in the judgment of SIR W. MANNING, J.

The Court reserved their judgments, which were now delivered *seriatim.*

SIR JAMES MARTIN, C.J. This was an action for malicious prosecution brought by the plaintiff against the defendants, who are an incorporated company. The declaration alleged in the usual way that the defendants falsely and maliciously, and without reasonable and probable cause, caused the plaintiff to appear before a Justice of the Peace to answer a charge of having feloniously stolen a bill of exchange for £1500. The defendants pleaded the general issue.

The facts were substantially as follows:—In March last a firm in South Australia drew a bill at 30 days' sight on Messrs. Owston and Co., of Sydney, for the sum of £1500. This bill was transmitted to the defendants, to whom were also sent the bills of lading of a quantity of wheat against which this bill was drawn. The defendants sent the bill to the plaintiff for his acceptance, and he wrote his acceptance upon it, but before the

(*a*) March 12.

defendants sent to him to get it back accepted, he received a telegram from the drawers informing him that the wheat would not arrive in Sydney as soon as it was originally intended. He then inquired by telegram of these drawers whether they wished the time for payment of the bill to be enlarged, but before he received the answer, in consequence of some intimation from the bank, he sent back the bill to them, having first erased his acceptance. The same day, however, he received an answer to his telegram informing him that the time of payment was to be extended from 30 to 60 days, and that the bank had been so instructed. He sent round to the bank to inform them of the receipt of this telegram, and to ascertain if they had received one to the same effect. Although the bank had received such a telegram, the plaintiff was not then told of it. After this, and on the same day, a youth brought the bill again to the plaintiff for acceptance, and he thought that this youth came direct from the bank to him to procure the acceptance under the new arrangement so telegraphed from the drawers. In point of fact, the bill, after it was returned by the plaintiff to the bank with his acceptance erased, was sent by them to their solicitors (Messrs. Allen, Bowden, and Allen) for the purpose of being noted for non-acceptance, and the youth who took it to the plaintiff was their clerk, and not the clerk of the bank. The plaintiff asked the clerk who thus brought the bill to him if the bank had received any fresh instructions, and the clerk said he did not know. The plaintiff then requested him to leave the bill, and said that he would accept it, and send it round to the bank. In about half an hour another person, also a clerk of the solicitors, called on the plaintiff and asked for the bill. The plaintiff told him also that he would accept it, and send it round to the bank, and he inquired if the bank had given instructions how they wished it accepted. He said he did not know anything about it, and again asked for the bill. The plaintiff again said he would send it round to the bank accepted. The clerk got excited, and angry words were used by him, he evidently being under the impression that the plaintiff was improperly withholding a bill which he had already refused to accept, and which had been presented to him only for the purpose of being noted, while the plaintiff was under the impression that the clerk was doing something irregular and impertinent in making these reiterated and offensive demands for the immediate delivery of a bill which he stated his willingness to accept and return in due course. The solicitors' clerk went away in a state of excitement without the bill, and the plaintiff again sent round to the bank to ascertain how the acceptance was to be made, whether by altering

the tenor of the bill, or by a special acceptance. Having received a message in reply from the bank, he accepted the bill, having struck out "thirty" and inserted "sixty" days, and sent it round to the bank. Neither the solicitors nor their clerks were aware that this had been done, and they being under the impression that the plaintiff was improperly withholding a bill which he did not intend to accept, and which had been presented to him only for the purpose of being noted, consulted among themselves what ought to be done in these peculiar circumstances. They came to the conclusion that the refusal of the plaintiff to give up the bill was a criminal offence, and it was determined to prosecute him for stealing it. Another demand was made of the plaintiff in the street, and he, annoyed and indignant at this (as it appeared to him) extraordinary and offensive conduct, declined to notice such demand in any way. The clerk who made this demand then said that he would go for the police. After this another clerk again went to the plaintiff for the bill, and he said that he had no bill for him. Shortly after that he was served with a summons to appear the next morning at the Water Police Court to answer a charge of stealing the bill. On receipt of this summons he went at once to the bank to see the general manager, Mr. Shepherd Smith. He did not succeed in having an interview with that gentleman, but he saw the assistant manager, Mr. Wilkinson. The plaintiff, when giving his evidence at the trial of the cause, was asked what Mr. Wilkinson said on this occasion, and this evidence was objected to; but it was ultimately admitted, subject to the right of the defendants to argue the question of its admissibility, on the ground that the bank could not in this action be held responsible for what the assistant manager had said or done. The plaintiff then stated what took place at this interview as follows:—

"I told Mr. Wilkinson I had received a most degrading and disgraceful document, and I had called to ascertain the meaning of it—what it was all about. He then said—'This is all right. *I instructed these proceedings.* You should have given up the draft; you refused either to give up the draft or to accept.' I said that was not the case, and that I had not refused. I further said I wished to make some explanation, and was opening a letter. Mr. Wilkinson said—'My dear sir, I have nothing to do with your correspondence.' I said, 'These explanations have already been made to the bill clerk of the bank.' He said, 'Have they been made to the bill clerk?' I said, 'Yes.' He then said the draft was in the hands of the bank's solicitors to note; that they had called upon him that afternoon to say that although the draft had been left with Owston and Co. they could not get it;

and that he had said, '*If you can't get it, take proceedings.*' 'But,' said I, 'you had the bill lying in the bank at the time.' He said, 'Have we the bill?' I said, 'Yes; it has been lying in your possession the greater part of the day, and yet you go and take these dreadful proceedings against me.' I said I had been very much annoyed by a man who had called for the bill, and who had conducted himself in my office in a most singular manner. He asked what time that might be. I said, 'Somewhere about 12 o'clock.' He then said, in a most jeering manner, 'Cold water, you may depend; if it had been after lunch it might have been something else.' I felt much annoyed at Mr. Wilkinson, and I remarked to him that I had had large transactions with the bank of New South Wales in Melbourne, and that they had always treated me and acted as gentlemen. He said, 'I trust you will always receive the same treatment here.' I said, 'Well, I consider this a most degrading and uncalled-for act, and during all my experience in life, and for twenty-eight years engaged in business in these colonies, I have never before heard of such a circumstance, and the bank will have to account for it.' He said, '*We shall be perfectly prepared to do that.*' He then called in Mr. M'Lachlan (the managing clerk of Messrs. Allen, Bowden, and Allen, and who was then in the bank), who, he said, represented the bank's solicitors, and said, 'I have been nearly assaulted by a violent spirit, and I have called you in to inform him in your presence *that the matter as to this draft is in the hands of the bank's solicitors to deal with.*' "

The next morning, Mr. M'Lachlan found out that a mistake had been made in issuing the summons against the plaintiff for stealing a bill which at that time was actually in the bank; and when the case was called on, no one appeared for the prosecution, and it was dismissed.

At the close of the plaintiff's case it was contended on behalf of the defendants than an action for malicious prosecution cannot be maintained against a corporation aggregate, and it was agreed that leave should be reserved to the defendants to move to enter a nonsuit on this ground.

The defendants' case was then gone into, and all the members of the firm of Allen, Bowden, and Allen, and their managing clerk, Mr. M'Lachlan, denied having received any instructions from the bank or from Mr. Wilkinson to prosecute the plaintiff; and Mr. Wilkinson denied that he had ever given any such instructions, or that he was in any way authorised to give them, or that it was any part of his duty. In this he was corroborated by the general manager, Mr. Shepherd Smith. Mr. Wilkinson further denied that in the conversation with the plaintiff he had

admitted that he had given any instructions to the solicitors to take proceedings against the plaintiff.

The jury found a verdict for the plaintiff, with £500 damages, and they found specially that the proceedings were authorised by Mr. Wilkinson on behalf of the bank.

A rule was obtained by the defendants to set aside the verdict and enter a nonsuit upon the grounds, and pursuant to the leave reserved, or for a new trial on the grounds:—

1st. That his Honor misdirected the jury by telling them that all the acts of the bank's solicitors, or their clerks, were, as regards the prosecution, in law the acts of the bank, although neither the bank nor its officers knew of them.

2nd. That his Honor misdirected the jury by telling them that the acts of Mr. Wilkinson were, as regards the prosecution, the acts of the bank.

3rd. That the special finding was against evidence, and had in fact no evidence to support it.

4th. That there was no evidence to allow the jury to find that the prosecution was instituted by the defendants either in fact or in law.

The question whether an action for malicious prosecution will lie against a corporation aggregate is one of considerable importance. It is a question in reference to which there has, down to the present time, been no judicial decision by any of the superior Courts in England. There have been opinions expressed upon the point by individual Judges, and cases of malicious prosecution against corporations have been tried without any objection having been taken by the defendants. But there has been no decision of any *Court* after an argument in which the point has been expressly discussed. It remains, therefore, for this Court now, for the first time, to determine by a formal judgment whether a corporate body, consisting of several persons, is liable to an action for malicious prosecution. I have given this question my most careful consideration, and the conclusion at which I have arrived is that no such action can be maintained.

It is incumbent on the plaintiff in every action for malicious prosecution to give evidence not only of the absence of probable cause for such prosecution, but also that the defendant was actuated by malice in instituting it. In other words, the plaintiff must shew not only that the defendant had no reasonable ground for the course taken by him, but also that he took that course from some motive other than a desire to vindicate the law. It is obvious that there is a wide distinction between doing a thing wilfully or intentionally, and doing it from a malicious motive. All that is required for the purpose of shewing wilfulness or

intent is evidence of assent. To ascertain the motive which influenced the mind to give assent, the mind itself has to be inquired into. To make this inquiry, it is evident that there must be a mind to which such enquiry can be directed. And here at once arises the difficulty—Where are we to look for the mind of a corporation? A corporation aggregate is a thing wholly impersonal. It has neither mind nor body. It is a mere expression invented to enable individuals, when associated by Royal or Parliamentary sanction in a particular way, to do certain things which could not be done, and to enjoy certain immunities which could not be enjoyed by them in any other manner. This physically non-existent thing in the old days, when the ingenuity of lawyers first called it into legal life for many useful purposes, could only, except for some minor objects, indicate its will by its common seal, which of course was in the custody of, and could only be applied by actually existent persons having authority for that purpose. In recent times, when innumerable corporations were created for the purposes of commerce, and so many acts were being continually done by them in carrying out the objects for which they were formed, the affixing of a seal to authenticate each act of the corporation became impossible, and the Courts relaxed the old rule, and allowed assent to be manifested in other ways than by the common seal. But whether by its seal or in those other ways, a corporation could always assent. It could always agree to contracts, appoint officers, and direct things to be done. The books are full of cases illustrative of this principle. Corporations can accordingly be made liable in trover, in trespass to land or personalty, in false imprisonment, in libel where express malice need not be proved, and for false representation made by their authority. In support of their liability in trover, *Yarborough* v. *The Bank of England* (*b*) is the leading case. "As a corporation," says Lord *Ellenborough*, in that case, "they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others; they cannot, as a corporation, be subject to a *capias* or *exigent* (the process in trespass), because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But wherever they can competently do or order any act to be done on their behalf, such as by their common seal they may do, they are liable to the consequences of such act if it be of a tortious nature and to the prejudice of others." In *Maund* v. *The Monmouthshire Railway Company* (*c*), the Court held that a corporation might be sued in trespass for breaking and

(*b*) 16 East 6. (*c*) 4 M. & G. 452.

entering locks on a canal, and seizing and carrying away barges and coal on the ground that it was liable for the tortious act of its agent done in its ordinary service. In *The Queen* v. *The Great North of England Railway Company* (*d*), it was decided (p. 326) that a corporation "may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large." In *The Eastern Counties Railway Company* v. *Richardson and Broom* (*e*), the Court of Exchequer Chamber expressed itself (p. 325) as "clearly of opinion" that "an action of trespass for assault and battery will lie against a corporation whenever the corporation can authorise the act done, and it is done by their authority." In *Ranger* v. *The Great Western Railway Company and others* (*f*), it was held that a corporation itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed, through the agency of individuals, who act fraudulently, the corporation stands in the same position with respect to the conduct of its agents as a private person would have stood had his agent so misconducted himself. "Strictly speaking," said Lord Chancellor *Cranworth*, in giving judgment (p. 86), "a corporation itself cannot be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, their objects can only be accomplished through the agency of individuals, and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principle must prevail where the principal under whom the agent acts is a corporation." In *Goff* v. *The Great Northern Railway Company* (*g*), the Court of Queen's Bench, following the case of the *Eastern Counties Railway Company* v. *Broom*, held that a railway company, though it be a corporation, is liable to an action for false imprisonment if that imprisonment be committed by the authority of the company, and that it is not necessary that the authority should be under seal. In *Mackay* v. *The Commercial Bank of New Brunswick* (*h*), their Lordships, speaking of an action for deceit, say (p. 415) that they do not "see any valid reason for exempting incorporated more than unincorporated companies from this action. In their opinion Lord *Cranworth* stated the law on this subject correctly in *Ranger* v. *Great Western Railway*." Their Lordships then quote the passage from that judgment of Lord *Cranworth* which I have already read, and adopt it as a true exposition of the law.

(*d*) 9 Q.B. 315. (*e*) 6 Ex. 314. (*f*) 5 H. of L. 72. (*g*) 3 E. & E. 672. (*h*) L.R. 5 P.C. 394.

In no one of these cases which I have cited is there any decision of the point which I am now considering—namely, whether a corporation aggregate is liable to an action for malicious prosecution. That question was, however, involved, or touched upon, in the four cases to which I am now about to refer.

In 1854, in the case of *Stevens* v. *The Midland Counties Railway Company and Lander* (*i*), the plaintiff sued the defendants for maliciously and without reasonable or probable cause prosecuting him for feloniously receiving a piece of tarpaulin, their property. The defendants, as in the present case, pleaded the general issue. It was contended in that case, as in this, that an action for a malicious prosecution cannot lie against a corporation. The Judge reserved the point for a nonsuit, and the plaintiff had a verdict. On the argument of the motion for a nonsuit or new trial, counsel for the plaintiff, in shewing cause, said that with respect to the question whether the action will lie against the company, although there is no decision precisely in point, still the principle of the authorities favours the view that it does lie, whereupon Baron *Alderson* interrupted counsel, and said, "How can it be said that a corporation is liable upon a charge of doing an act *malo animo* when a corporation has no *animus*. I do not say that the directors may not be individually liable if they knowingly and maliciously direct the prosecution of an innocent person; but they are not invested by the company with any such authority." In giving judgment, Baron *Alderson*, after holding that the case was clear against the defendant Lander, went on to say with reference to the corporation as follows:—"With respect to the other part of the rule, it seems to me that an action of this description does not lie against a corporation aggregate, for in order to support the action it must be shewn that the defendant was actuated by a motive in his mind, and a corporation has no mind." Here, then, is not an *obiter dictum*, but an express decision of this very eminent Judge on the very point now in controversy, and in a case, and on an issue, exactly like the present. Baron *Platt*, who agreed with Baron *Alderson* in deciding in favour of the corporation, did so on the ground that there was no evidence to connect them with the prosecution. "I am of opinion," he says, "that there is no evidence against the corporation; but I do not say that a case may not arise in which a motive might be assigned upon which the action could be maintained." Baron *Martin* decided the case on the same ground as that relied upon by Baron *Platt*, and

(*i*) 10 Ex. 352.

added,—"I think it unnecessary to give any opinion upon the question whether this form of action would lie against a corporation." Here we have the judgment of Baron *Alderson*, that such an action will not lie against a corporation aggregate, and no contrary opinion expressed by either of the Judges who decided the case with him. They were of opinion that there being no evidence whatever to touch the corporation, it was unnecessary to decide the point as to the liability of the corporation to such an action. Their judgments, therefore, although they do not support that of Baron *Alderson*, do not oppose it in any way, and it stands, consequently, unimpeached as to the *decision* of a Judge of as high authority as any then upon the Bench.

In 1858, four years after, occurred the case of *Whitfield* v. *South-Eastern Railway Company* (*j*). This was an action brought against the defendants—a corporation aggregate—for falsely and maliciously publishing a libel. The defendants demurred to the declaration, and their counsel contended that a corporation aggregate is not capable of malice. Mr. Justice *Crompton*, during the argument, said, "If the occasion were such as *primâ facie* to justify the words, it may be a very grave question whether it is possible to prove express malice in a corporation." The Court took time to consider the case. On a subsequent day Lord *Campbell*, in delivering the judgment of the Court, said, "The demurrer to the declaration in this case can only be supported on the ground that the action will not lie without proof of express malice as contradistinguished from legal malice. But if we yield to the authorities which say that in an action for defamation malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by shewing that the publication of a libel took place by order of the defendants, and was, therefore, wrongful, although the defendants had no ill-will to the plaintiffs, and did not mean to injure them. Therefore, the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But, considering that an action of tort or trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation."

With the very greatest respect for this very eminent *Chief Justice*, I cannot regard this suggested difficulty, of saying, under

(*j*) E. B. & E. 115.

circumstances which he does not state, whether or not malice can be proved against a corporation, as of sufficient weight to counterbalance the judgment of Baron *Alderson*, or to prevail against the reasons by which, as I venture to think, that judgment can be supported. As I have already endeavoured to point out, a corporation may be properly liable for what they wilfully do, or authorise to be done, or for the frauds of agents whose acts they ratify, or by whose acts they derive advantage, without calling into question the motives by which those acts were induced. In all the instances to which Lord *Campbell* refers, it was the acts themselves which made the corporation liable, and those decisions, therefore, have no bearing on cases where it is incumbent on the plaintiff to prove not only the doing of the acts, but also the motives which led to their being done. This passage which I have quoted from Lord *Campbell's* judgment must, I think, with great respect, be regarded only as an example of those loose and inconclusive expressions of vague doubts which have done so much to render uncertain points which a more careful analysis would have easily placed beyond further controversy. The allusion made by his Lordship, and by other Judges, to the possible injury which individuals might suffer if compelled to sue the agents of a corporation instead of the corporation themselves, is of no force in the consideration of the question of a corporation's liability. If the agent of a corporation, who maliciously and without reasonable cause prosecutes a person, is poor, that is no reason why the corporation, which may be rich, is to be made liable. I am constrained to say that this case of *Whitfield* v. *South-Eastern Railway Company* leaves the question of the liability of a corporation aggregate to an action for malicious prosecution, or to any action in which express malice must be proved, where it was before.

In 1859 the case of *Green* v. *The London General Omnibus Company* (*Limited*) (*k*) was decided by the Court of Common Pleas. That was an action brought against the defendants—a corporation aggregate—for wrongfully, vexatiously, and *maliciously* driving their omnibuses against the omnibuses and horses of the plaintiff. The defendants demurred to the declaration, and their counsel contended that malicious intention was the gist of the action, and that a corporation could not, as such, be actuated by malice. In the course of the argument, *Byles*, J., said, "What is the meaning of *maliciously*?" Whereupon *Erle*, C.J., said, "A wilful violation of the law, producing damage to an individual, must be presumed to be malicious;"

(*k*) 7 C. B. N. S. 290.

and *Crowder*, J., added, "Would this declaration be bad without the allegation of malice? *Does the allegation mean anything more than wilful?*" The plaintiff's counsel contended that this was the true view, and the Court so held. "Unless the acts charged," says the Court (p. 302), "were *wrongfully* done, the plaintiff, of course, would have no ground of complaint. We are clearly of opinion that the action lies. . . . We found our judgment upon the numerous class of cases of which *Yarborough* v. *The Bank of England*, where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities, is by no means the first, and which afford abundant examples of the application of the principle we now rely upon. . . . We think it extremely important that these companies should be held responsible where they admit they have *intentionally done a wrongful act.*" Here there is not one word said about the *malice* of the defendants. The word "*maliciously*" in the declaration was regarded as meaning no more than wilfully or wrongfully. The intention to injure the plaintiff, although alleged, was immaterial. The act itself was admitted by the demurrer to be wrongful, and the defendants were therefore held liable, just as they would have been for any act of trespass or false imprisonment committed by their agents under their authority, express or implied. This case, therefore, leaves the present question where it found it.

In 1870 there were two actions, in which this question was again, not raised, but involved, namely—*Walker* v. *South-Eastern Railway Company*, and *Smith* v. *same* (*l*). Both these actions were for assault, false imprisonment and malicious prosecution. The verdicts were for the plaintiffs, with leave reserved to the defendants in each action to move to enter the verdict for them. This the Court did, so far as regarded the counts for malicious prosecution, on the ground (among others) that no questions were left to the jury to shew the want of probable cause, or on the question of malice. It does not appear anywhere in the report of these cases that the defendants were incorporated companies (although I have no doubt they were), nor is there one word either in the argument of counsel, or in the judgment of the Court, about the liability of a corporation aggregate to be sued in such an action. I am not aware of any other cases in which this question has been agitated, and it is plain to me that, so far as authority is concerned, Baron *Alderson's* judgment in the case in *Stevens* v. *The Midland Railway Company and Lander* is the only actual decision, and that is against the action lying.

(*l*) L.R. 5 C.P. 640.

All the other observations of Judges are no more than vague doubts or evasions of the question, and the acquiescence of counsel and Judges in one or two cases, where for some reason or other the liability of the corporation to be sued for malicious prosecution was not contested, cannot amount to authority.

I repeat what I have already said, that in my opinion no such action can be maintained, on the plain ground that malice, being essentially a state of mind, cannot be attributed to a corporation which has no mind. A corporation by its agents may do a thing, or order a thing to be done, either by its seal, which some persons must have authority to use, or by necessary implication, from the manner in which its servants are permitted to act for it. These acts we can trace to a corporation and prove to be done by it, but the *motives* of a corporation are beyond the reach of all inquiry, because they do not and cannot exist. For these reasons, therefore, I am of opinion that the rule to enter a nonsuit ought to be made absolute.

With reference to the special finding of the jury, that the proceedings were authorised by Mr. Wilkinson, notwithstanding the larger and apparently preponderating amount of evidence the other way, I am of opinion that the verdict cannot be interfered with. There was evidence enough to warrant the jury in arriving at the opinion which they expressed on this point, and, even although I should think that the conclusion at which they arrived was an erroneous one, I could not consistently with the principles on which the Court acts in matters of this kind set aside their decision. They were the duly-constituted judges of the facts; and unless their verdict on those facts is plainly and manifestly wrong, their opinion ought to be allowed to prevail.

Further, if Mr. Wilkinson had power to bind the bank by his instructions to their attorneys, I think that what he was stated by the plaintiff to have said to him was more than an admission after the event. At the time of the interview which the plaintiff had with him the prosecution had been commenced and was still pending, and the statements therefore which were sworn to by the plaintiff to have been made were acts rather than admissions.

I am of opinion, however, that Mr. Wilkinson had not, by virtue of his position as acting-manager, power to bind the bank at all in this case, even supposing that, contrary to my view as already expressed, the action would lie against them at all. Managers, acting-managers, and clerks of a banking corporation cannot be presumed to be the agents for such corporations, except for the transaction of the ordinary business for which they were instituted, and criminal prosecutions constitute no portion of such business. For the apprehension of persons

uttering forgeries and committing other criminal acts under the immediate observation of any clerk or servant of a bank, every such clerk or servant has, as one of the public, the power on his own responsibility to apprehend, or cause to be apprehended, the person so committing such offence. The corporation can only become responsible by a recognition of the act by its governing body at the least, or by an authority under its common seal. Where a corporation can be made liable for the acts of its servants (as in trespass), in the absence of express authority or ratification the acts to bind the corporation must be done in the exercise of the servant's ordinary duty. On this principle the case of *Smith* v. *The Birmingham Gas Company* (*m*) was decided, and *Maund* v. *The Monmouthshire Canal Company* was to the same effect. In *The Eastern Counties Railway Company* v. *Richardson and Broom*, already cited by me, the defendant Richardson, an inspector in the service of the company, took the plaintiff out of a railway carriage, and also took him into custody on the several charges of not producing his ticket, of not paying his fare, and of annoying the company by being intoxicated. The Court held that, as it was not shewn that there had been any directions given to Richardson or to the servants of the company in general to enforce the by-laws, there was no evidence of the company's authority to Richardson so as to bind them for his acts. It was contended in the case that the appearance of the company's attorney before the Justices to conduct the case against the plaintiff amounted to a ratification by the company, but the Court held otherwise. In the case of *Stevens* v. *The Midland Counties Railway Company and Lander*, also already cited, the defendant Lander was the company's superintendent at Derby. He gave the plaintiff into custody for stealing a piece of tarpaulin, the property of the company, and the prosecution was conducted, as in the present case, by the company's attorney. The plaintiff brought his action for malicious prosecution against both the company and Lander, and Baron *Alderson*, as already stated, held that the action would not lie. Baron *Platt* said:—"The company are not responsible by reason of the person acting as their solicitor having attended at the trial of the prosecution. It is not shewn that the company had given directions for this particular proceeding, and Lander was merely one of their servants." He held, therefore, that there was no evidence against the corporation. Baron *Martin* said that there was "no evidence" that Lander "was acting otherwise than on his own account." These cases are authorities for holding that the defendants are not liable for the acts of either Mr.

(*m*) 1 A. & E. 526.

Wilkinson or the bank's attorneys, and that, therefore, on the first and second grounds, independently of the reserved ground, the verdict ought to be set aside. In the case of *Goff* v. *The Great Northern Railway* (*n*), the Court of Queen's Bench (following the case of *Giles* v. *The Taff Vale Railway Company* (*o*), held apparently to some extent in opposition to the case of the *Eastern Counties Railway Company* v. *Broom*, that a superintendent of a railway line had authority to bind the company in giving a person into custody for a breach of one of the company's by-laws. It is by no means satisfactory to find two cases decided by the Court of Exchequer Chamber—the one in 1851, and the other in 1853—apparently at variance with each other; but if they cannot be reconciled, and it seems difficult to reconcile them in all respects, still this latter case does not support the ruling of his Honor, to the effect that the act of Mr. Wilkinson was, *as a matter of law*, the act of the bank. In *Giles* v. *Taff Vale Railway Company*, as well as in *Goff* v. *Great Northern Railway Company*, the like question was expressly held to be one of fact for the jury. The same thing was held in *Poulton* v. *London and South-Western Railway Company* (*p*), in which Mr. Justice *Blackburn* (p. 538) says, "Where a railway company, or any other body, have upon the spot a person acting as their agent, *that is evidence to go to the jury* that that person has authority from them to do all those things on their behalf which are right and proper in the exigencies of their business—all such things as somebody must make up his mind, on behalf of the company, whether they should be done or not; and the fact that the company are absent, and the person is there to manage their affairs, is *primâ facie* evidence that he was clothed with authority to do all that was right and proper." There was evidence in the present case that Mr. Wilkinson had not authority from the bank to institute a criminal prosecution such as that for which this action was brought, and that evidence was practically withdrawn from the jury by the direction given to them that Mr. Wilkinson's act in ordering the prosecution was the act of the defendants.

The case of *Goff* v. *The Great Northern Railway Company* was decided in 1861. In 1867 *Barwick* v. *The English Joint Stock Bank* (*q*) was decided, and there (p. 266) the Court (including Mr. Justice *Blackburn*, who delivered the judgment in *Goff's case*), stated the principle of a company's liability for its agent's acts in cases of false imprisonment in these terms:—"It has been held applicable to actions of false imprisonment in cases

(*n*) 3 E. & E. 672. (*o*) E. & B. 822. (*p*) L.R. 2 Q.B. 534. (*q*) L.R. 2 Ex. 250.

where officers of railways *entrusted with the execution of by-laws relating to imprisonment*, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws." The Court of Common Pleas, three years after (1870), in the case of *Edwards* v. *London and North-Western Railway Company* (*r*), adopted this statement of the law. In that case the question was whether a person in charge of a railway station had implied authority from the company to bind them by giving a person into custody for stealing their property. The Court held that he had not. "There is no evidence in the case," said Mr. Justice *Keating*, "of anything like express authority being given by the defendants to Holmes; and if there is any evidence to fix the defendants, it must be upon an implied authority resulting from Holmes's position as their servant, and that raises broadly the question whether a person in the position of Holmes has implied authority to give into custody anyone whom he suspects to have stolen his masters' goods. I think there is no such implied authority. It is admitted that the point is new, and that there is no case in which such an authority has been assumed to exist. The cases that have been referred to in support of the contention are cases where a company has made by-laws and an Act of Parliament has given authority to the company's servants to apprehend persons committing offences against the by-laws. It has been held that under such circumstances the servants may be considered to have authority to enforce the by-laws and to do whatever is necessary for that purpose." "There seems no ground," his Lordship added, "for saying that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted. If Holmes acted from a sense of the duty which rests on every one to give in charge a person who he thinks is committing a felony, his conduct would in no way be connected with the defendants." The other Judges took substantially the same view, and Mr. Justice *Brett* pointed out that in *Poulton* v. *London and South-Western Railway Company*, Mr. Justice *Blackburn* held, "that it is not enough that the act should be for the benefit of the master, but it must be in the ordinary course of business, in order that an authority to do it may be implied."

The passage in Mr. Justice *Blackburn's* judgment to which Mr. Justice *Brett* refers is the following:—"In *Goff* v. *Great Northern Railway Company* the act was the arresting a man for the benefit of the company where there was authority to arrest a passenger

(*r*) L.R. 5 C.P. 445.

for travelling without paying his fare, and the Court thought, and no doubt rightly, that the stationmaster and the policeman who were employed there must be assumed to be authorised to take people into custody whom they believed to be committing the act, and if there was a mistake, it was a mistake made within the scope of their authority." In other words, in cases of false imprisonment a company is liable for its agents' acts where there exists in the company an express power to arrest, and those agents are the officers appointed to carry out that power, but as already shewn, these circumstances are only *primâ facie* evidence of a question of fact which the jury have to decide. No one of the authorities which I have cited sanctions the ruling of his Honor to the effect that the bank was liable, as a matter of law, for the acts of their acting-manager or their attorneys in the matter of instituting and conducting the prosecution against the plaintiff.

In conclusion, I am of opinion that a nonsuit ought to be entered in this case, on the ground that an action like the present does not lie against a corporation aggregate, and if I am wrong on this point, I am further of opinion that the verdict ought to be set aside and a new trial had herein for the misdirections to which the defendants have objected.

HARGRAVE, J. [after stating the facts and the grounds taken in the rule]:—

Now, upon the express admission of Mr. Wilkinson himself, as before the jury on plaintiff's evidence, being the acting-manager, though under Mr. Shepherd Smith as general manager, that all the bank transactions as to this particular bill of exchange emanated from Mr. Wilkinson, or clerks under his immediate authority, and that when informed at the bank of the criminal proceedings he still allowed matters to proceed in the bank's name, and that Mr. Wilkinson's own admissions confirm the general view of the direct evidence as "authorising" these outrageous proceedings against Mr. Owston, I entirely concur with the special finding of the jury.

With regard to statements on the other grounds of this rule, that the evidence was insufficient to support this verdict, as against the bank, it needs only to be pointed out that there is not a single tittle suggestive of direct testimony by any witness that either Messrs. Allen, Bowden and Allen, or the bank manager, had the slightest personal interest in this bill of exchange, or that any one of the officials was, in fact, acting *personally* in these most unfortunate proceedings.

However, the bill of exchange was the bank's actual property; and all the transactions and conduct of all parties were on

behalf of the bank, and of the bank alone; and were also conducted, as far as is usual or practicable in such matters, by the bank on the bank premises, or by instructions express or implied from the bank manager.

It must also be observed that it is only necessary to give slight evidence to establish "agency" in such cases as the present, as laid down by such cases as *Bates* v. *Pilling* (*s*) (1826), *Michell* v. *Williams* (*t*) (1843), and *Jarman* v. *Hooper* (*u*) (1843). In most of these cases there seems to me quite as much evidence of "agency" as would exist if there had been in fact any real ground for the prosecution. If Mr. Owston had been the dishonest man suggested by the prosecution, what more could have been done by Mr. Wilkinson and his clerks on behalf of the bank, or by Messrs. Allen, Bowden, and Allen, and their clerks on behalf of Mr. Wilkinson as manager? But there was, in fact, not the slightest evidence of reasonable or probable cause for this prosecution.

Moreover, in matters of this sort, the verdict of the jury, as mercantile gentlemen and business men, must be more than conclusive against any interference by me as Judge;—for the jury must have seen that, if merchants and other gentlemen having banking transactions are to be exposed to such prosecutions as the present, while engaged from day to day in their ordinary business in Sydney, business must be entirely suspended and rendered impossible.

With regard to the law applicable to the grounds for this rule *nisi*, I think this rule is founded on a totally erroneous view of the law as to the responsibility of the banks and other corporations or joint stock companies for the acts and conduct of their managers or other officers.

In *Goff* v. *Great Northern Railway Company* (*v*) (1867), the whole question of the liability of corporations for the misconduct of all their officials as to false imprisonment was fully considered and established, as beyond future question.

The well-known case of *Barwick* v. *English Joint Stock Bank* (*w*) (1867) is also expressly applicable to the present case, as to the banks being liable for the concealments and fraudulent misrepresentations of their officers whilst engaged in the banks' transactions.

The concurrent case of the *Bank of Scotland* v. *Addie* (*x*) (1867), and the case of *Bank of Upper Canada* v. *Bradshaw* (*y*) (1867), both before the Privy Council, have long since fixed the law as to banking directors and managers; and the more recent

(*s*) 6 B. & C. 38. (*t*) 11 M. & W. 205. (*u*) 6 M. & G. 287. (*v*) 3 E. & E. 672. (*w*) L. R. 2 Ex. 250. (*x*) L. R. 1 Sc. App. 145. (*y*) L. R. 1 P. C. 479.

cases of *Swift* v. *Winterbotham* (*z*) (1873), *Swift* v. *Jewsbury* (*a*) (1876), expressly adopt and follow *Barwick's case* as undoubted law, and not to be questioned or disturbed.

These cases down to *Swift* v. *Winterbotham* were again fully considered by the Privy Council in the case of *Mackay* v. *Commercial Bank of New Brunswick* (*b*) (1874), where their Lordships expressly adopted the words of Lord *Coleridge's* judgment, in *Swift* v. *Winterbotham*, as follows:—"There can be no doubt that where an agent of a corporation, or of a joint stock company, in conducting its business does something of which the joint stock company take advantage, and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and *authority supports justice in maintaining that they cannot afterwards repudiate the agency*, and say that the act which has been done by the agent is not an act for which they are liable."

These leading cases are, in some degree, illustrated by the less important cases, cited during the argument, of *Poulton* v. *London and S. W. R. Co.* (1867), and the three cases of *Edwards* v. *L. and N. W. R. Co.*, and *Walker* v. *S. E. R. Co.*, all in 1870; and the subsequent cases of *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway* (*c*) in 1872, as to the improper arrests, or other misconduct by railway-station masters and servants; and the more recent case of *Lord Bolingbroke* v. *Swindon Board of Health* (*d*) (1874), as to the non-liability of masters for the misconduct of other servants not within the ordinary scope of their employment.

Limpus v. *London Omnibus Company* (*e*) and *Green* v. *General Omnibus Company* (1866) are to the same effect.

Mr. Justice *Blackburn's* luminous judgment in *Moore* v. *Metropolitan Railway Company* (*f*) (1873), as to the ordinary business of railway companies, is equally the law as to all banking and other trading companies.

Mr. Justice *Blackburn's* words are as follows:—"I think that there was evidence that the person who gave the plaintiff into custody was acting with the authority of the defendants. *Goff* v. *Great Northern Railway Company* was a well-considered case, and the principles there laid down have never been deviated from. Where a railway company are carrying on business, there are certain things which are necessary to be done for the carrying on of the business and the protection of the company; and *there are things which, if done at all, must be done at once; and, therefore,*

(*z*) L. R. 8 Q. B. 244. (*a*) L. R. 9 Q. B. 304. (*b*) L. R. 5 P. C. 364. (*c*) L. R. 7 C. P. 415. (*d*) L. R. 9 C. P. 575. (*e*) 1 H. & C. 527. (*f*) L. R. 8 Q. B. 38.

the company must have some person on the spot to do these things;— a person acting with common prudence and common sense, clothed with authority to decide as the exigency arises what shall be done. *Giles* v. *Taff Vale Railway Company*, which was followed by *Goff* v. *Great Northern Railway Company*, laid down the rule that if such person intending to exercise his authority makes a mistake and does an act which cannot be justified, the company are responsible, because he was their agent. *Goff* v. *Great Northern Railway Company* also decides *that where there is a necessity to have a person on the spot to act on an emergency, and to determine whether certain things shall or shall not be done, the fact that there is a person on the spot, who is acting as if he had express authority, is primâ facie evidence that he had authority*, and the presumption that he had authority must be rebutted by the company."

Nothing can be added to such judgments as Lord *Coleridge's* or Mr. Justice *Blackburn's* by any words from me, and to my mind the law is perfectly clear and conclusive as to the liability of the Bank of New South Wales for all the proceedings against Mr. Owston.

As for our reproducing into the administration of justice Lord *Coke's* idea that corporations have neither souls nor bodies (even though repeated by Baron *Alderson*), and that they cannot be capable of "malice," or otherwise amenable to ordinary rules of natural justice and the jurisdiction of law and equity, it is quite enough to cite Mr. Chief Justice *Erle's* remark in *Green* v. *General Omnibus Company*, that any such idea of "corporate immunity" "is more quaint than substantial," and to point to the long list of modern cases shewing that in all malicious prosecutions like the present, corporations are quite as liable as any one of ourselves for the misconduct of their agents, and that in all other respects juries must be directed to apply the ordinary rules of law and equity to the civil transactions of banks and their managers as if unincorporated.

Lastly, considering the great extension of banking and other joint stock companies and corporations during modern years, it would be a most extraordinary step for this Supreme Court to advance an opinion that as Mr. Wilkinson was the manager of an "incorporated bank," Mr. Owston must submit to the injury or seek relief personally either against the mere official of the bank, Mr. Wilkinson, or against the solicitors of the bank, Messrs. Allen and Bowden, personally.

In my opinion, there is much more ground upon the evidence for suggesting that Mr. Owston's right of action might have been against Mr. M'Laughlin for his over zeal in commencing these criminal proceedings against Mr. Owston, before he had express

instructions either from Messrs. Allen, Bowden, and Allen, or from Mr. Wilkinson; though all these gentlemen have very properly ratified and confirmed Mr. M'Laughlin's over zeal, though only in their official capacities, the former as solicitors for the bank, and the latter as acting bank manager; and upon the evidence and the authorities cited, Mr. Owston's only remedy is, in my opinion, against the bank.

I think I ought, lastly, to refer to the defendants' own Banking Act (*g*), which is before the Court, and of great importance to every point arising in this case, both upon the evidence, and upon every point of law.

The first section of this Act, as in other Banking Acts, prevents all idea of corporate immunity to this banking company, and expressly enacts that the bank "can sue and be sued in all Courts whatsoever, at law or in equity, and prefer, lay, and prosecute any indictment, information, and prosecution against any person or persons whatsoever for any stealing, embezzlement," &c, as was done in this case.

Reading this section by the light of the important authorities I have already cited, and by the natural justice and necessity of the case, I am quite clear that this rule ought (upon all the grounds) to be discharged, and with costs.

SIR W. MANNING, J., shortly stated the facts and proceeded:—

At the close of the evidence I decided that the prosecution had been "without reasonable or probable cause;" and as this decision is not now questioned it must be taken to be correct. The question of "malice" was of course left to the jury, who were duly advised that malice might be inferred from recklessness and the like, or from any undue motive in prosecuting, such as the abuse of criminal process for the sake of a short cut to a civil right—*e.g.*, the recovery of property. They, by their verdict, affirmed the existence of sufficient malice; and as their verdict in this respect stands unchallenged, it must now be regarded as a true finding of the fact.

Hence we have now no question as to the completeness of the cause of action against whomsoever it may concern. But inasmuch as the information for the alleged stealing emanated from the office of the solicitors, and did not come direct from the bank, it became a question at the trial whether the prosecution was, under the circumstances detailed in the evidence, that of the bank; and in connection with this question two points were raised, namely, whether Mr. Wilkinson had, as contended for the plaintiff, set the solicitors in motion; and whether he possessed any express or implied power in virtue of which his so acting could

(*g*) 14 Vict.

cast a responsibility on the bank. And it was further contended that as the bank was a corporation aggregate, it could not be liable to an action for a malicious prosecution, on the ground that a corporation has no mind, and, therefore, no capacity for malice.

The first of these questions was put by me to the jury, with the request that they would answer it specially; and they returned the following answer—"*We find that the proceedings were authorised by Mr. Wilkinson on behalf of the bank.*" Upon the second question, I told the jury that it was to be implied from Mr. Wilkinson's position, as manager, that he had sufficient power, under the circumstances, for directing a prosecution. And, upon the third point, I decided against the immunity claimed in virtue of the defendants' incorporation.

The jury having found a verdict for the plaintiff, with £500 damages, it is now sought to set it aside, on the ground that the jury were wrong in their special finding of authorisation by Mr. Wilkinson, and that I was myself wrong in my rulings upon the other questions. My opinion is against the motion upon every ground.

As to the first point, the established rule of the Court is that no verdict or finding of a jury upon a question of fact shall be disturbed unless the Court think it manifestly wrong, and that if there be any substantial evidence in its support, the Court will in general recognise the right of the jury to act upon it in preference to other evidence, even though the Court itself should think the balance of testimony unfavourable to the verdict or finding. In this case I do not think the finding was manifestly wrong; and I do consider that there was sufficient evidence in its favour to bring the case within the rule above stated. Further, it is right to add that I see no ground for expressing to any extent a disapproval of the finding. Probably, indeed, I should have arrived at the same conclusion if the duty of deciding had devolved on me; although I may also state that if the jury had arrived at a contrary verdict I should have seen no cause for the expression of dissent from his place.

At the trial, the effort for the defence was to cast the responsibility for the prosecution upon the solicitors; and the latter appeared quite willing to accept the responsibility so far as it could come in question in this case. The plaintiff, on the other hand, urged that he could know nothing of undisclosed matters between the bank and its solicitors, and that as he had been prosecuted by the latter in respect of the bank's affair he had reasonable ground for drawing an inference to the effect that the solicitors had not acted without the authority of their clients; and he shewed that under that impression he had accordingly

gone at once to the bank manager, who adopted and justified the act. His evidence was that on shewing the summons to Mr. Wilkinson, that gentleman (who, it appeared, did not even then know that the accepted draft had been at the bank for some hours) said at once, "This is all right. I instructed the proceedings. You should have given up the draft. You refused either to give it up or accept;" and again, "The draft was in the hands of the bank's solicitors to note. They called upon me this afternoon to say that, although the draft had been left with you, they could not get it; and I said if you cannot get it take proceedings."

This evidence was directly contradicted by Mr. Wilkinson. And another officer of the bank, who was present at the conversation, or a part of it, confirmed the denial.

The defendants also called several witnesses, amongst whom was Mr. Wilkinson, who had been present at the interview already mentioned, between him and the solicitors, and which was the only occasion at which the instructions could have been given, if given at all (there being an error either in Mr. Wilkinson's statement, or in Mr. Owston's recollection of it, as to an interview with the solicitors having occurred *at the Bank)*; and who all concurred in distinctly negativing the instructions. This evidence was relied upon, in the first place, as tending to shew, by implication, that Mr. Wilkinson could not have made the assertions attributed to him in Mr. Owston's evidence, and thus to discredit him; and secondly, to shew that, *in point of fact*, Mr. Wilkinson had not given the supposed authority before prosecution, and that, therefore, the act complained of could not be attributed to the bank, even though the jury should think that Mr. Wilkinson had incorrectly *assumed (post factum)* to have given them.

As regards the contradictions of Mr. Owston's evidence, whether by direct denial of its truth, or by the implication above referred to, I think it sufficient to state that the jury had all the witnesses before them, and that it was in their province to determine between them; and that they adopted the testimony of Mr. Owston. But it is due to the jury to state that there appeared, upon cross-examination of some of the defendants' witnesses, such an incompleteness of memory as to what *affirmatively* passed, that they were fully entitled to hesitate in accepting their negative statements as to either interview. And as there was reason to think that the solicitors had received an impression of Mr. Owston's criminality before their interview with Mr. Wilkinson, the jury may have inferred from that fact, together with the further facts that the solicitors caused the information to be laid

shortly afterwards, and that when Mr. Owston spoke to Mr. Wilkinson, he did not, according to any version of the conversation, indicate surprise or disapprobation of the course taken, that something must have passed at that interview which the witness did not recall, but which had sufficed at the time to create the understanding that the requisite authority for action had been given and received. And when they had once come to a conclusion in favour of Mr. Owston's version of the conversation at the bank, they could have no difficulty in relying upon the assertions thereby shewn to have been made by Mr. Wilkinson almost on the instant, in preference to the denials made from memory at the trial. It was indeed contended that such inferences were not legitimate as against positive denial by respectable witnesses; but to this I cannot assent. The jury were quite at liberty to draw their conclusions from the less obvious, but perhaps not less reliable, sources which presented themselves to their judgment, and to reject, if they saw fit, the most distinct allegations to the contrary.

Further, it was urged that Mr. Wilkinson's alleged statements were in the nature of narrative by an agent, *post factum*; and that Mr. Owston's evidence of them ought not to have been received at all. From this also I must dissent, on two grounds:— First, that Mr. Wilkinson's position and general authority made him virtually the bank itself rather than an ordinary agent; and, secondly, that the statements were really not *post factum* except in a most limited sense, but had reference to a pending matter in which he was then competent to act, or to withhold action, on behalf of the bank. The summons was for appearance on the following morning; and at the very moment of Mr. Owston's interview the solicitors' managing clerk was in attendance at the bank to get the materials for the further prosecution of the case. Mr. Wilkinson also was even then not aware that the draft had left Mr. Owston's hands, and he spoke under the belief that Mr. Owston was still withholding it. And the interview was in the manager's official room at the bank, and was, from its tenor, evidently regarded on both sides as official on Mr. Wilkinson's part. Under these circumstances, I do not think it possible to regard the statements then made in the light of mere narrative rather than as official action pertinent to a business in hand.

Whilst thus disposing of the objections made for the defendants in connection with the special finding of the jury and the evidence, I admit that there was, on the other hand, a great deal of strong evidence for the defendants to shew that the solicitors acted on their own responsibility, and in defence of their own possession of the draft in their capacity of notaries, and not for

or on behalf of the bank; and that if a jury had taken that view of the case, I should, as already intimated, not have considered myself entitled to express my dissatisfaction.

In conclusion, upon this first question, it will not be out of place to observe that, having reference to the *primâ facie* probability that the bank's solicitors would not have acted in the bank's business without authority, and having regard also to the disadvantage in which the plaintiff stands in not having the opportunity to thread his way through the labyrinths of connection between the solicitors' junior clerk who filed the information at one end, up to the banking company at the other, it appears to me highly probable that if this case were sent back to another jury there would be the same result. And I think, also, that when it is plainly to be seen that the plaintiff has sustained a very substantial injury in connection with the bank, and that the verdict gives him no more than a reasonable compensation, the Court ought not to harass him with a second trial upon a question of divided or disputed responsibility between the bank and its solicitors, unless the grounds for so doing should amount to judicial compulsion. It should prefer to let the verdict stand, and leave the bank and solicitors to settle the question of ultimate responsibility between themselves.

Secondly. As to Mr. Wilkinson's power, as manager, to give the stated authority or instructions—my opinion still is that his position, and the circumstances of the case, demanded the inference of power. I must first observe that the question of authority cannot depend upon the discretion used in its exercise, or upon whether the prosecution proved just or unjust; for this would give complete immunity to principals in respect of almost every case of tort by agents. Consequently, the question must broadly be, whether Mr. Wilkinson, as manager, had any power at all to prosecute; and this broad question will be most soundly tested by putting an extreme case. Thus: Let it be supposed that a bank manager should be credibly and rightly informed of a theft on the bank premises, and that valuable property of the bank had been feloniously abstracted, and was about to be taken out of reach; and suppose, further, that such information were such as reasonably to satisfy him that unless an information were instantly laid, and a warrant and search-warrant obtained and put in execution, the bank's property might be irrecoverably lost. In such a case, could it be contended, with reason, that the manager would have no implied authority from the company to take the necessary proceedings? Surely not.

It is, indeed, said that there is no necessity for such an implication of authority, because the right of prosecution for public

crimes belongs to every individual person; and so the manager might act upon his own personal responsibility by laying an information himself; or by directing it to be laid by some one else who might be more competent to make the necessary oath.

It is true enough that he would be legally competent so to do, and that he might, as between himself and his employers, take the responsibility upon himself if he thought fit to assume so foolish a position. But it is idle to suppose and unreasonable to expect that he would do so; and that which would be unreasonable should not be implied. The prosecution would, in the case supposed, be a clear matter of official duty, and would have no relation to the manager's personal capacity as a private individual. And I think it obvious that any company would, under such circumstances, expect its chief executive officer on the spot to act at once, in his official capacity; and under peril, it may be, of loss of office or of displeasure if he failed to discharge so manifest a duty; and what the company may be taken to expect of its officers, it must of course be assumed to have authorised.

No doubt the manager might, *quoad alios*, be held personally responsible for a wrong prosecution, if the prosecution were actually instituted by him. But this only shews that the injured person has a remedy against the immediate wrong-doer, without at all affecting the question of remedy against the principals for whom the person acted. To me it appears quite enough for the company to expect its officers to expose themselves at the election of others to personal responsibility for acts done in the company's interest, without casting upon them the exclusive liability and seeking immunity for themselves. But the question does not rest between the company and its officers, for strangers are concerned in the question; and, as said by Lord *Campbell* in *Whitfield* v. *S. E. Ry. Co. (vide post)*, "Instances might easily be suggested where great injustice would be suffered by individuals if their remedy for wrongs authorised by corporations aggregate were confined to the persons employed." The manager of a company may be personally without the means of meeting an award of damages; whilst the company who put him into the position to do the wrong, and for whose benefit it was intended, may have abundant funds to bear the responsibility. To which may be added, in a case such as the present, that the high position and wealth of the company tends to aggravate the disgrace and practical danger of a prosecution, and to justify, for that reason, a measure of damages which would not be appropriate to like proceedings in the case of a private individual.

Then it is said that the manager might and ought in this case to have awaited instructions from the board of directors. If so, a manager ought equally to do so in the test case I have put—and to this there appear to me abundant answers. In the first place, I cannot see anything in the constitution of the company which in any special way delegates this duty to the directors rather than to the manager; though it may be admitted that the latter might under their general powers overrule the manager, even in respect of a prosecution. *Primâ facie*, such a duty as this would seem to be the subject of delegation to an executive officer, in a position to act on the instant and on the spot, and not to the deliberative board, whose meetings are periodic, and whose ordinary duties lie in different directions. Nor would the board be adapted to act upon the emergency, if it were only for the fact that the directors cannot be specially convened (so as to possess legal authority as a board) without a notice of stated duration. In this case, twenty-four hours appear to be necessary; and it need hardly be said that the delay thus occasioned, and the further delay of deliberation at the board, might, in the case supposed, be fatal to the object of proceedings,—and it is not unworthy of remark that this idea of reference to the directors would be manifestly inapplicable to managers at remote branches; and yet it is scarcely to be supposed that such officers are impliedly entrusted with powers in such matters which are denied to the superior manager at the head office.

The case I have put was an extreme one to test a principle; but, in truth, the great majority of instances in which it becomes incumbent on bank officers to initiate criminal proceedings, are cases of almost like emergency, and requiring like promptitude of action. They are not, indeed, always called for in protection of the bank's own property, but are sometimes for the protection of its customers; and sometimes, also, for the protection of other persons, whose stolen cheques or forged instruments are brought to the bank. But, in all such cases, it would be preposterous to suppose that the manager is to act with the rope of exclusive personal reponsibility about his neck, or to wait till a board can be got together, and a board-minute obtained; and not less unreasonable would it be that in the event of a wrong being done the injured person should be bid to look only to the bank officer who had acted to his prejudice.

It was, indeed, sought to be proved in this case by the evidence of the general manager or superintendent that the board of this bank had by its practice and orders kept the subject of prosecutions exclusively in its own hands; but this evidence fell short,

on cross-examination, of establishing the fact, unless, perhaps, in respect of the prosecution of the bank's own defaulting officers, —and for this exception there might well be special reasons. But suppose the evidence had succeeded in shewing that the directors had, so far as in them lay, put a restraint upon the manager in respect of all prosecutions, I should disregard the fact in relation to outside persons. Such persons only know of the board as a secret body, whose deliberations and actions in reference to the affairs of the company, and whose relations to the company's officers, are shut out from their view; whilst the manager, on the contrary, is openly seen as the chief executive officer of the company in the conduct of its business, and in the protection of its property. They also know that the company's statute gives it full power to prosecute, and they cannot fail to understand that such power is incapable of being exercised by the company at large, but must necessarily be entrusted to executive officers; and when they also see that, in the matter of prosecuting upon a supposed emergency, the manager is the only person who is practically in a position to act, they are, in my opinion, entitled to imply that (whether the authority be derived from the company at large, or from its board of management) he is invested with the necessary powers for acting.

In this case there was, according to the view taken by the manager as to the supposed facts of the case, and according, also, to the view of the bank's solicitors, an occasion of emergency seriously affecting the interests of the bank, and requiring prompt action. Accordingly, the manager did, in the opinion of the jury, authorise the prosecution "*on behalf of the bank.*" And, as regards one who has suffered by the manager's actings on this assumption of emergency, it can be no answer to say that he and the solicitors adopted this view without due inquiry, and indiscreetly.

I might, perhaps, dispense with any further allusion to the company's statute; but, as it constitutes an important element in the question now under consideration, I will here refer to the language in which it empowers the company to take criminal proceedings, and will state my interpretation of the enactment. The words are, that the company "may prefer, lay, and prosecute any indictment, information, and prosecution against any person or persons whomsoever, for any stealing, embezzlement, fraud, forgery, crime, or offence," &c. Under these words, it is certain that the corporation could not, *quâ* corporation, exercise the power; nor could the company at large do so; for it does not belong to a corporation aggregate to lay and swear to the truth of informations, or otherwise to proceed actively in such matters;

nor is it compatible with the principle of delegation of the powers of management, and of the surrender of individual partnership powers, which constitutes a chief feature in joint stock companies, that the company at large should (were it practically possible) exercise such powers. Whom, then, did the Legislature intend to exercise them? Not, I think, the directors, whose ordinary duties lie, as I have said, in other directions, and who are a deliberative and directing rather than an executive body, and who would be cumbrous and dilatory for such a purpose; but, in my opinion, the executive officers contemplated by the deed of settlement and recognised by the statute, and who are presented to the outside world as the active representatives of the company. Such, I feel sure, must have been the meaning of the Legislature; and I am equally confident that, when thus investing the company with power to prosecute by its officers, the correlative responsibility of the company for their acts was also contemplated by Parliament.

Many English decisions were referred to in the course of the argument, and I have since examined them. They appear to me to support the view that I have taken upon this question when applied to an officer having such general executive authority as a bank manager. [See *Barwick* v. *The English J. S. Bank* (*h*), *Thompson* v. *Bell* (*i*), and *Goff* v. *The Great Northern Railway Company* (*j*).]

The cases cited to establish the contrary are cases in which the action of the officer was beyond the company's own powers, and, therefore, not within the company's capacity to delegate by implication; or in which the act under question was not required for the company's protection, or not within the scope of that particular officer's ordinary authority, and the like; and throughout these cases a distinction appropriate to this present case was noticed in favour of the liability of companies.

I had not proposed to extend this judgment by noticing all these cases, being satisfied to express the general results to which they have led me. But my respect for the dissent of one member of the Bench compels me to illustrate my meaning by as brief a reference as possible to a few of the authorities.

Thus, in *Barwick* v. *The English Joint Stock Bank*, the judgment of the six Judges by whom the case was unanimously decided, distinguished between a banking company's responsibility for the fraud of its manager and that of a principal in reference to the fraudulent act of an inferior agent; and in so doing the Court used these words: "*The author of that act not being their general agent in business, as a bank manager is.*"

(*h*) L. R. 2 Ex. 265. (*i*) 10 Ex. 13. (*j*) 3 E. & E. 672.

Swift v. *Winterbotham* (*k*) was an action against the registered public officer of a bank for a false and fraudulent representation by its branch manager that one Russell was in solvent circumstances, whereby the plaintiff was induced to give credit, and sustained a large loss. The cause was tried before Chief Justice *Cockburn* in 1872, and the plaintiff obtained a verdict. A rule *nisi* for a nonsuit was afterwards obtained on the ground, amongst others, that the bank were not liable for a false representation by this manager; but was discharged by the Full Court in 1873. And in the judgment, after disposing of some other points, the Court said as follows:—

"It was objected on the part of the bank that the company as a principal was not liable for the fraud of its agent, Goddard (the manager), unless it authorised the commission of the fraud or ratified it. As to this point, assuming the case to be one in which a principal is sought to be made liable for the fraud of his agent, we consider that the case of *Barwick* v. *The English J. S. Bank* is conclusive to shew that the banking company is liable for the fraudulent representation of its manager made in the course of conducting the business of the company."

In *Goff* v. *The Great N. Ry. Co.* it was held, in reference to the arrest of a passenger by railway for not having paid his fare as authorised by the Railway Company's Act, "that, inasmuch as the exigency of deciding whether or not a particular passenger shall be arrested by a railway company's servants under that statute must be naturally expected to arise frequently in the ordinary course of the company's business, and is of such a nature that the decision must be made promptly in the company's behalf, it is a reasonable inference that the company have on the spot at their stations officers with authority to make the decision promptly for them;" and accordingly it was held that the company was liable for a wrongful arrest under the orders of the superintendent at one of their stations, although that officer was not the chief manager.

In *Poulton* v. *London and S. W. Ry. Co.* (*l*), the decision in *Goff's case* was referred to and affirmed in these terms—"There can be no question, since the decision of *Goff* v. *The G. N. Ry. Co.*, that when a railway company or any other body (for it does not matter whether it is a railway company or not) have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all these things in their behalf which are right and proper in the exigencies of their business,—all such things as somebody must make up his mind, on behalf of the company, whether they should be

(*k*) L. R. 8 Q. B. 244. (*l*) L. R. 2 Q. B. 534.

done or not; and the fact that the company are absent, and the person is there to manage their affairs, is *primâ facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess while acting within the scope of his authority, his employers are responsible for it."

Thompson v. *Bell* was a case in which a bank was held responsible for moneys fraudulently obtained by a branch manager, and appropriated to his own use. There was an ingredient in the case which distinguishes it from the present one; but I refer to it more particularly for the following words of Chief Baron *Pollock*:—"The manager of a bank is a person appointed to conduct the entire business irrespective of the partners."

In a very recent case of *Christie* v. *S. W. Railway Company*, noticed in the *Home News* for January of this year, the action was for a malicious prosecution by the company, through its general manager, and the liability of the company appears to have been recognised both by the counsel and the Court, and a verdict for the plaintiff was taken by submission of the plaintiff with the approbation of the Judge.

It is thought by one of their Honors that I erred in directing the jury that the manager's authority was to be implied from his position and the exigencies of the case; and that I ought rather to have left the question to the jury for inference from such position and exigencies. The subject was scarcely, if at all, discussed in this way at the Bar; but it was broadly denied that the position gave any authority in the matter of prosecutions, without conceding that the question might be submitted to the jury as an open question of fact; and I gather that such is the view now taken by his Honor.

In consequence, however, of this opinion on the Bench, I have reconsidered the matter, and have examined the authorities, without seeing any ground for changing the views expressed by me at the trial. It is true that in some of the cases the Court has used expressions pointing rather to the jury than to the presiding Judge for a decision upon this question of authority; but this seems to me to have been occasioned by the inferior rank and restricted authority of the officers whose acts were charged against their principals. In such cases there were reasons for inviting a jury to consider whether the particular acts were within the scope of the authority; but, even there, the expressions having the above tendency occur side by side with authoritative language savouring of legal implication. Where, however, the question has been as to the acts of officers entrusted with the general conduct of the business of their principals—and notably

in the case of bank managers—the Judges appear to have treated the question of authority as more distinctly within that category; and even in the case of *Poulton* v. *London and S. W. Railway Co.*, the less general position of the agent in that case was said to be *primâ facie* evidence of the power, which amounts to much the same thing, in the absence of rebutting evidence. Were we not to treat such a case as this as establishing a legal implication of authority, suitors would be exposed to the chance (for such it would be) of contradictory inferences by juries from the same well understood, openly manifested, and every day position and circumstances, and without there being anything whatever to guide them legitimately into opposite directions. My opinion is that the Court is competent and best able to decide whether a particular act is in the general scope of the authority of a bank manager, and that in this case the authority might be legally implied. And even if I had thought that the question belonged in theory to the jury, I should have accompanied the direction with such strong observations as would have been almost the practical equivalent of a legal opinion; and I do not doubt that with, or even without, such observations from the Bench, the jury would have come to the same conclusion.

Thirdly. There remains the question whether the corporation aggregate can, under any circumstances, be liable for a malicious prosecution? The denial of liability rests upon the technical idea that a company which becomes incorporated merges its natural existence in the myth of incorporation, and is thereupon rendered incapable of malice, because a corporation is said to have "no mind"; and in support of this idea, a dictum of Mr. Baron *Alderson*, in the year 1854, is quoted from the case of *Stevens* v. *The Midland Railway Company (post)*.

The proposition contended for is startling when applied, as it must be, to all the numberless incorporated partnerships which, in our day, conduct so large a proportion of the business of the country, and which are exactly the same in their actual capacity to commit wrongs on individuals, by their officers, as any unincorporated association. And if the theory be correct, there is not, so far as I can see, any sufficient ground for distinguishing between any other case of wrong depending upon the exercise of will, intention, or motive, and this one of malicious prosecution; nor could any case be accepted out of the rule, although the wrong were the most flagrant that could be conceived; nor again, would the immunity be confined to cases of wrongs by officers of the corporation, but it would include acts done by the direction of boards of directors, or even under the further authority of a general meeting of shareholders. For there would not the less

be the alleged bar of incorporation in any of those cases. It would come to this, that the bare fact of incorporation would give a complete immunity to the incorporated company and to the funds of its shareholders; notwithstanding that the shareholders and their association, their business and their mode of conducting their affairs, their funds, and even the substance of their powers for mischief as well as for usefulness, are identically the same as in the case of any other similar joint stock partnership. Nay, even the same identical company would be with or without this immunity according to whether it had or had not the superadded privilege of incorporation Thus, on the mythical ground that a corporation is a mere "expression" without body or mind, although it has a very substantial existence for acts good or bad towards others, its shareholders are to enjoy an unreasonable and unjust immunity which would otherwise be denied them.

Such a proposition is not to be admitted unless under the clear language of positive legislation, or under judicial authority which the Court cannot resist.

For my part, I see no such foundation for it; but on the contrary, I think that both legislation and authority are opposed to the claim.

If we look to the statute passed for this company, or to those of other incorporated partnerships, or to the terms of the general "Companies Act" (37 Victoria, No. 19), we shall find no warrant for the proposition, except by taking the operative words of incorporation without the general context, and thereupon applying to them the old principles which attached, or were supposed to attach, to political corporations. We shall find in these Acts no trace of an intention to destroy or alter the character, the constitution, or the operations of the companies, or to confer any privileges to the prejudice of others, or to give protection from the ordinary legal consequences arising out of the companies' dealings with or conduct towards others. On the contrary, it will be found obvious that no privilege was in view, but that of the facilitating proceedings on behalf of or against the companies, or otherwise in relation to their business, leaving untouched all matters otherwise pertaining to such proceedings.

The special Act of Parliament by which the now defendant company was incorporated, manifests a clear recognition of the company and its shareholders in the light of an ordinary joint stock partnership, without shewing the least intention of making any such changes as I have alluded to.

Thus, it first recites the establishment of a joint stock banking company under the name of the Bank of New South Wales, and

under and subject to the rules, &c., in its deed of settlement; and an agreement to carry on the business of a joint stock company or partnership for the purposes specified. It then recites that due provision had been made by the deed for management by directors; and, lastly, that the company was desirous of being incorporated, and that it was expedient that it should be incorporated accordingly, but subject to the provisions in the Act after contained. Then comes the enactment, as follows:—"Such, and so many persons as have already become, or shall or may at any time in manner provided by, and subject to, the rules, &c., contained in the said deed of settlement, become proprietors of shares in the capital of the company, shall, for the purpose aforesaid, but subject nevertheless to the conditions, restrictions, regulations, and provisions hereinafter contained, be one body politic or corporate in name and in deed, by the name of the Bank of New South Wales, and by that name shall and may sue any person, &c., whether a member or members of the corporation or not; and may be sued, implead, and be impleaded in all Courts whatsoever at law or in equity," &c. And it then proceeds to authorise the use of the corporate name, in describing any money, &c., &c. In the next clause there is an enactment adopting as the by-laws of the corporation, the laws, &c., contained in the deed of settlement, or to be made and in pursuance thereof, except as altered by or inconsistent with that Act, &c., &c. And subsequently, there are other provisions adapted to the corporation as an ordinary banking company under statutory regulations; and recognising, amongst other things, the individuality of each shareholder, by imposing upon him a liability beyond his shares in the capital, which liability would not have attached to him as a holder of shares in an ordinary corporation at common law.

Without adding further remarks as to the limited effect of this Act, as evidenced by its whole tenor, it will suffice to say, that as regards the subject of liabilities, the only words are those which declare that *such persons as shall be the holders of shares* in the company (that is to say, the associated partners) shall, and may, "*by the name*" *of incorporation*, "be sued or be impleaded in all Courts whatsoever, at law or in equity."

This, and simply this, is what is being done here—The "*holders of shares*" are being sued for a wrong done by their servants, and for which they are liable at common law; but, by reason of this enactment, they are being sued in their aggregate or corporate "*name.*"

Before proceeding to examine the authorities, I may test the question on a principle which has occurred to me, and which has

probably led, more or less, to the later decisions, though I do not find it particularly mentioned in any of the cases. It is this, that the fanciful idea that a corporation aggregate cannot be sued because it has "no mind," can have no logical application to actions for torts by agents. In such cases, the wrongful mind or motive is wholly in the agent, whilst the principal may be regarded as absolutely free from any personal participation in the wrong. Therefore, we need not, in this case, inquire whether the corporation, or even the associated partners, irrespective of incorporation, were or were not guilty of malice, or were or were not mentally capable of it. In fact, malice in the corporation, or in the company at large, is in no way an element in the case. The malice is, as it were, imputed to the principals, on the ground that they have, for their own purposes, put agents in their places, and given them the capacity to go wrong in the exercise of their delegated powers. Independently of the incorporation, the company is a joint stock partnership, in which, according to the ordinary feature of such associations, the shareholders, each and all, surrender their powers as partners, and delegate them to directors and officers; and, as it has suited them so to conduct their affairs, they or their property must be liable for certain wrongs done by their delegates, and must, in all cases in which wilfulness, malice, or any other mental operation is involved, be judged by what was in the minds of those delegates. Indeed, the shareholders are absolutely precluded from bringing their minds to bear upon any of the ordinary business of the company. Such being the fact, it appears to me illogical to suppose that any distinction can here arise out of the superadded incident of incorporation.

As to the authorities, there appears to be nothing whatever in direct support of the proposition we are considering, except the dictum already referred to of Baron *Alderson*, in *Stevens* v. *Midland Railway Company* (*m*), where his Lordship said as follows:—"It seems to me that an action of this description (malicious prosecution) will not lie against a corporation aggregate; for in order to support the action it must be shewn that the defendant was actuated by a motive in his mind, and a corporation has no mind."

But the point was not essential to the decision of the case; and of the two other Judges on the Bench, one of them (*Platt*, B.) said—"I do not say that a case might not arise in which a motive might be assigned upon which the action could be maintained;" and the other (*Martin*, B.) said—"It is unnecessary to give any opinion upon the question whether this form of action would lie against a corporation."

(*m*) 10 Ex. 356.

This dictum was, therefore, of little, if any, value at the time of its utterance; and we find that, although the question has never since been made the subject of a distinct decision in reference to a malicious prosecution, yet that such actions have in later days been entertained against corporations without question either from the Bar or the Bench; and that, in the case of other classes of wrongs by agents of incorporated companies, the liability of the corporation has been upheld, notwithstanding that, in the commission of those wrongs, it was as inevitable that there should have been mind and actuating motive, as in the case of a malicious prosecution.

The actions for malicious prosecutions against incorporated companies which are reported, and in which no question has been raised as to the effect of incorporation, are those of *Walker* v. *The S. E. Ry. Co.* and *Smith* v. *The S. E. Ry. Co.*, and the very recent case of *Christie* v. *The S. W. Ry. Co.*, already noticed.

In "libel," malice is essential, though not in quite the same sense as in "malicious prosecution;" and yet the question of liability for libel was distinctly established in the case of *Whitfield* v. *The S. E. Ry. Co.* (*n*), in the face of an objection that the action could not lie against a corporation. It was, indeed, said by the Court that in that case "express" malice was not essential to the liability; but the language of Lord *Campbell* upon that point, in delivering the considered judgment of the Full Court, appears to me far more than sufficient to outweigh the isolated dictum of Baron *Alderson*. His Lordship there says, "But, considering that an action of tort or trespass will lie against a corporation aggregate, or that an indictment may be preferred against a corporation aggregate, both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation."

In the case of *Green* v. *The London General Omnibus Company* (*o*), the same technical point was taken for the defendants, in answer to a complaint of wilful and intentional wrong, by so driving the defendants' omnibuses as to obstruct and injure the plaintiff; but the objection was over-ruled; and in the judgment of the Full Court, Chief Justice *Erle* said, "The doctrine relied on, that a corporation, having no soul, cannot be actuated by a malicious intention, is more quaint than substantial." I venture to add, that it belongs to an order of thought which was greatly prevalent at one time, but which (happily, as I think) has begun to disappear from the administration of justice, and which it would be well wholly to remove.

(*n*) E. B. & E. 115. (*o*) 7 C. B. N. S. 290.

In *Barwick* v. *The English Joint Stock Bank* (already referred to), the defendants, who were an incorporated company, were held liable for false representations intentionally made by their manager, whereby the plaintiff was defrauded; the present objection not being taken at all by the competent counsel who argued the case, nor noticed by the Court.

In *Mackay* v. *Commercial Bank of New Brunswick* (*p*), decided so recently as in 1874, it was held that an action of "deceit" could be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent. And, in the course of the judgment of the Full Court, the following observation, which Lord *Cranworth* had made in a case of *Ranger* v. *Great Western Railway* (*q*), was cited as being a correct statement of the law: "Strictly speaking, a corporation cannot of itself be guilty of fraud; but where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals, and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principle must prevail where the principal under whom the agent acts is a corporation."

This last case appears to me quite conclusive, because it is impossible to say that there is less occasion for "mind" or for an "actuating motive," in respect of fraud, than in the case of a malicious prosecution, and because I can see no *other* ground for the distinction attempted to be set up in reference to the latter class of cases.

Upon the whole, it appears to me that the company's statute and the English decisions concur with reason and principle in determining this point against the defendants.

Fourthly. There was a further question at the trial, whether the bank might not have been liable in respect of the act of their solicitors, independently of proof of express authority by the manager. Upon that point I told the jury that I had very great doubts, but I invited them to assume such liability, subject to the opinion of the Court in Banco, in order that there might be an assessment of damages contingent upon that opinion; but I also stated that this view of the case would become immaterial if they should find that the bank manager had given actual instructions for the prosecution. As they found that fact, and as the Court now upholds their finding, it has become unnecessary to discuss this part of my direction. Nor was the

(*p*) L. R. 5 P. C. 394. (*q*) 5 H. of L. 86.

subject argued before us so as to demand a decision. I think it, however, right to say that although reason and justice appear to demand that the bank and its solicitors, and all their respective officers, partners, and clerks should be regarded as one person in reference to the subject of this plaintiff's complaint, yet that I am not prepared, in the absence of argument, to hold that the rules of law accord therewith.

Rule discharged with costs.

Attorneys for the plaintiff—*Want, Johnson, and Want.*

Attorneys for the defendants—*Allen, Bowden, and Allen.*

RICKETSON *v.* BARBOUR. (*a*)

Trespass—Crown Lands Acts—Timber Reserves—Licenses to cut Timber—Regulation 96.

To a declaration for trespass to the run of the plaintiff, a pastoral tenant of the Crown, the defendant pleaded that the *locus in quo* had been duly reserved from sale for the preservation of timber, and justified the trespasses under licenses to cut timber on such reserve. *Held*, a bad plea.

Per SIR JAMES MARTIN, C.J., and HARGRAVE, J. Land reserved from sale under the 4th section of the Crown Lands Alienation Act for the preservation of timber are not "Crown lands" within the meaning of the 31st section of Crown Lands Occupation Act, which empowers the Governor to issue licenses.

Per FAUCETT, J. Such lands are "Crown lands" within the meaning of the Crown Lands Occupation Act, but the Government having reserved them for the preservation of timber is not at liberty to issue licenses to cut the timber upon them.

PER CURIAM. Such licenses confer no right to cut timber on a timber reserve.

The plea alleged that the D and M. Railway Company applied for and obtained special permits or licenses for cutting and removing timber, and that certain of the said licenses and permits were handed over to certain timber-cutters to enable them to cut and remove timber. In the rejoinder it was stated that each of the said timber-cutters had a separate license, and that the same had not been transferred within the meaning of Regulation 96. *Held* (per HARGRAVE and FAUCETT, JJ.; *dissentiente*, SIR JAMES MARTIN, C.J.), that there was no departure.

DECLARATION—Trespass to lands known as the Araboola and Currawalla runs.

PLEA—That in the month of August, 1871, His Excellency the Governor, with the advice of the Executive Council, by notice in the *Government Gazette* duly declared that a certain area of land, including the said lands mentioned in the said declaration,

(*a*) March 22.

should be, and the same were thereby directed to be reserved from sale for the preservation of timber in pursuance of the provisions of the Act in that behalf; whereupon the same became and were set apart, dedicated, and reserved accordingly as such reserve for timber as aforesaid. And that afterwards the Deniliquin and Moama Railway Company, being a company by an Act of the Legislature of New South Wales aforesaid duly incorporated, and authorised to lay and make a railway from Deniliquin to Moama, in the said colony of New South Wales, for such purposes required large quantities of timber; and, in order to procure the same, applied to Her Majesty's proper officer, having authority in that behalf, for, and obtained from such officer, special permits or licenses for cutting and removing timber within and from the said reserve, in the introductory part of this plea mentioned, on each of which several and respective permits and licenses the proper fees were respectively paid. And, further, that the defendant contracted and agreed to supply to the said railway company certain large quantities of such timber as aforesaid, and, in order to enable the defendant to supply the same, he contracted and agreed with the several timber-cutters for the supply by them to him of such respective quantities as would enable the defendant to supply the said railway company with the said agreed quantity of timber. And, further, that, in order to enable the said timber-cutters to cut and remove such timber as they had so, as aforesaid, agreed to supply to the defendant, there were, with the knowledge, sanction, and consent, in that behalf, of Her Majesty's proper officer in that behalf, handed over to the said timber-cutters certain of the said permits and licenses; and such timber-cutters, under and by the authority and permission of such permits and licenses, cut and removed from the said lands certain trees, logs, and timber, and for the purpose of so removing the same necessarily used certain horses, cattle, and teams, and drove away from the place where they were so, as aforesaid, cutting and removing such trees, logs, and timber, and with their said horses and cattle ate and consumed the grass and water on certain parts of the said lands, and, in cutting and removing the said trees, and cutting and trimming the same into logs, planks, sleepers, and timber, the said timber-cutters left the tops of the said trees on the grass on the said lands, for all such purposes doing no unnecessary act, injury, or harm, which are the alleged trespasses and grievances herein pleaded to.

REPLICATION. 1. That under and by virtue of the 36th section of the Crown Lands Occupation Act of 1861, certain regulations were duly made and proclaimed by the Governor, with the

advice of the Executive Council, the 96th section of which regulations is as follows, that is to say:—"A separate license must be taken out by every person actually employed in felling, cutting, sawing, splitting, or removing timber, or in quarrying, digging for, or removing stone or soil on Crown lands. Each license will be personal to the individual named therein, and will not be transferable."

2. That under and by virtue of the 36th section of the Crown Lands Occupation Act of 1861, certain regulations were duly made and proclaimed by the Governor, with the advice of the Executive Council, part of the 97th section of which said regulations is as follows, that is to say:—"Licenses will empower the holders of them to enter upon any Crown land, whether under lease or otherwise, not measured for sale or dedicated to any public purpose."

REJOINDER. 1. That each of the said timber-cutters in the plea mentioned had a separate license, and the same had not been transferred within the meaning of the said regulations in the said first replication mentioned and set out.

2. That the said lands in the said plea mentioned were not measured for sale or dedicated to any public purpose within the meaning of the said regulation in the said second replication mentioned and set out.

CROSS DEMURRERS. Defendant demurring to the replication, and plaintiff demurring to the rejoinders, and giving notice that he would contend that the plea was bad.

M. H. Stephen (*Butler*, Q.C., and *Salomons* with him), for the plaintiff, in support of the demurrer. There are two points. 1. Has the Crown power to issue licenses to cut timber on a timber reserve at all? 2. Has the Crown power under the Acts to issue the licenses in the particular way alleged? The first is the more important point. If a reserve is for the preservation of timber, it must stand to reason that the timber, cannot be cut. [SIR JAMES MARTIN, C.J.: As a matter of historical fact, these regulations were introduced with the specific object of preventing certain persons from cutting timber on these reserves, and especially the present defendant.] The defendant draws a distinction between temporary reservation under s. 4 of the Crown Lands Alienation Act, and permanent reservation under s. 5. But really both reservations are for the same purpose, and so long as the temporary dedication lasts, it is equally binding. In this colony the Crown has no prerogative rights over the land; those were given up by the Constitution Act, and the Crown can only grant licenses under the terms of the Lands Acts. Then it may be said that a breach of the regulations only affects the Crown and not

the squatter; but a pastoral tenant who pays for his land can only be intruded upon by a person who complies with the regulations. Again, how does the defendant justify under the timber-cutters? he is not their servant. As to the rejoinder, it does not allege that the licenses were personal, or, if it does, it is a departure from the plea. Under s. 31 of the Occupation Act, without the regulations, any license to be issued would, in its nature, be personal. If the action were against the timber-cutters, how could they justify except under separate licenses in their own names? The regulation is most explicit. If there was a power to issue licenses for cutting on timber reserves, what is the use of s. 39 of the Lands Acts Amendment Act? It is only reasonable to suppose that the Legislature gave a power which did not exist before.

Davis, for the defendant. If this demurrer is sustained, s. 31 of the Occupation Act may as well be struck out. The land in question is Crown land, and s. 31 distinctly recognises the right of the holder of a license to cut timber on any Crown lands. Land temporarily dedicated under s. 4 of the Alienation Act does not cease to be Crown land. The object of s. 4 is to preserve timber for purposes of revenue, that the Crown may obtain money for licenses to cut it. [SIR JAMES MARTIN, C.J.: What does "preservation" mean?] To preserve it from being cut without the license of the Crown. The object of a temporary reserve is to prevent squatters, on whose runs the timber may be, or other persons from cutting it for nothing. [SIR JAMES MARTIN, C.J.: Is there any advantage to the public in reserving the land for the purpose of licensing people to cut the timber instead of selling the land?] Is it contended that the timber upon the reserve could not be cut by the Crown for Crown purposes? [SIR JAMES MARTIN, C.J.: Cutting is authorised on any Crown lands. But these are not Crown lands.] We submit they are Crown lands. The exception in the definition of Crown lands in the Act refers only to lands permanently dedicated under section 5 of the Alienation Act. [FAUCETT, J.: Does a temporary reserve from sale prevent the Crown from receiving rent for that land from the lessee?] No; it remains Crown land. It is said that the rejoinder is a departure from the plea. It only explains what is alleged in the plea. In the plea it is stated that the licenses were handed over; the rejoinder only explains the phrase "handed over." There is nothing in the plea inconsistent with each timber-cutter having a separate license, as is alleged in the rejoinder. It is not necessary that each license should contain the name of the person using it. There is nothing to oblige a man to take out a

license in his own name. The only object of the regulation is revenue. If A. takes out a license, he must not use it, and then transfer it to B.; two people must not cut under the same license. But there is nothing to prevent A. taking out a license in the name of B., if only A. uses it. Suppose the railway company paid for 20 licenses, made out in the name of the company. How can the company cut timber but by their workmen? They put a license in the hands of each of their 20 workmen. This is not transferring them within the meaning of the regulation, and there is a substantial compliance with the regulation. The rejoinder does not say that the licenses were not "handed over," but that they were not "transferred" within the meaning of the regulation. That is an issue of fact to be tried by the jury. In *Richards* v. *Whitford* (*b*) a pleading explaining a prior pleading was held not to be a departure. It is said that the defendant cannot justify under the licenses to the timber-cutters, as he was not their servant. But we say we did not commit the trespasses you complain of except through the timber-cutters. If we are liable for their acts, we can avail ourselves of their justification.

Sir James Martin, C.J. [after stating the declaration and plea]. I will not now go farther in the pleadings, for the plea raises this most important question, about which, until this argument, I should have thought there was no manner of doubt—whether the notification in the *Gazette* of a reserve for the preservation of timber prevented the Government from issuing licenses to cut timber on the land so reserved. It has been the general understanding of all Governments, and of the public, that the object of such a reservation was to prevent the cutting of timber, and not to facilitate it. It can have no other purpose. Let us trace the legislation in this matter from the beginning. In the Crown Lands Alienation Act of 1861, Crown lands are defined as "all lands vested in Her Majesty which have not been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted in fee simple." If land is dedicated to any public purpose, it is not Crown land. Then follows the 4th section, by which the Governor is authorised to declare by notice in the *Gazette* what lands shall be reserved from sale, until surveyed, for the preservation of water supply or other public purpose. "And upon any such notice being published, such lands shall become set apart, attached, *dedicated*, or reserved accordingly." Then by section 31 of the Crown Lands Occupation Act, the Governor may authorise the issue of licenses to enter any Crown lands and cut any timber. But what are

(*b*) 3 S. C. R. 296.

Crown lands? By the interpretation clause, they are lands not dedicated for any public purpose. The authority to issue licenses for timber-cutting does not, therefore, exist in the case of land which is dedicated, and, consequently, is not Crown land. So the question is narrowed to this—has there been a dedication of this land? The plea, itself, says that the land was dedicated. Was the purpose, then, one for which, under section 4, the Governor was authorised to dedicate the land? It seems to me to be a very proper and legitimate public purpose to preserve the timber growing on the land, and to prevent people from cutting it down. It appears to me, therefore, that the plea is no answer to the declaration, for it sets up a state of facts which shews that the defendant is clearly out of Court. After stating that the land was dedicated for what is clearly a legitimate purpose under section 4, and was, therefore, no longer Crown land, it was impossible for the defendant to justify under section 31 of the Crown Lands Occupation Act, which refers only to Crown land. This substantially disposes of the whole of the defence; for, if the Crown has no power to issue licenses to cut timber on land which has been so dedicated, the whole justification of the trespass fails. But I will deal shortly with the other points which arise on these pleadings. The plaintiff replies that there is a regulation requiring every license to be separate and personal to the individual named therein. In answer to that, there is a rejoinder by the defendant that each timber-cutter had a separate license. As to that, suppose that a license was of any use whatever on land dedicated for a public purpose, it is quite clear that the license must be personal to individuals, mentioning their names. Now, the licenses on which the defendant has relied in his plea, are not by any means licenses of that kind. It is not stated in the plea in whose names the licenses were made out, or by whom they were handed over. It appears to me that this rejoinder is a departure. If it was intended in the rejoinder to allege that each of the timber-cutters had a separate license in his own name (and that is the only license of any good under the regulation), then that is not what is alleged in the plea. However, this question is only important as far as costs are concerned, since the defendant, in my opinion, is clearly out of Court on his plea. On the whole record, I think there should be judgment for the plaintiff.

HARGRAVE, J. I should have wished to have had an opportunity of looking more carefully into all the pleadings in this action, but I will endeavour to state my views as clearly as I can. I do not think we ought to strike out, as his Honor the *Chief Justice* has done, all that is said about the Deniliquin and Moama

Railway Company in the plea. The construction of that railway is a public purpose authorised by Act of Parliament. And now, what is the state of affairs? The Crown is in possession of a temporary reserve from sale for the preservation of timber near the place where the works of this railway are being carried on. Railways are wanted in the country, and I think that a reserve for the preservation of timber for public purposes is intended, not that the timber should go on growing there upon the ground and rot, but that it should be preserved to be used for public purposes. Independently of the construction of the sections of the Acts, common sense shews that railways cannot be constructed in this country without some such power as this being given to the Government, to reserve the timber to be used in their construction. Unless there are such reserves, no timber would be available; timber would have to be bought from the squatters who lease the Crown lands, and the expense of construction would make railways impracticable in many parts of this country. The reservation spoken of in section 4 is a reservation from sale. I do not read that as a reservation for all time, but only temporarily, and for the advancement of the public works of the colony. But I do feel pressed by the strong argument that Crown lands are lands which have not been dedicated to any public purpose. And these lands are by section 4 said to be "dedicated." Whether temporarily or not, they are still dedicated. And this construction must exclude any reservations under section 4 of the Alienation Act from the operation of section 31 of the Occupation Act. Such reservations are not authorised to be entered by a licensee under section 31. The Government had, therefore, no right under this section to go back upon the dedication, and to grant a license to cut timber on these lands, as if they were Crown lands within the meaning of the Acts. As to the other points, it seems to me that upon the pleadings these licenses are sufficiently stated to be personal. It is not necessary, in my opinion, that the licenses should be made out in the names of individuals; but, even if it were, it is quite consistent with the pleadings that the company obtained these licenses, each in the name of the individual who was to use it. Still, as the licenses, even if issued according to the regulations, would not entitle the holders to go upon land reserved under section 4, I think that the justification is not made out, and concur with his Honor in holding that the judgment of the Court should be for the plaintiff on the demurrers.

FAUCETT, J. On the mere question of the sufficiency of the plea, I might have been of opinion that the licenses were sufficiently stated in the plea and rejoinder, read together, to be

separate and personal. It is quite consistent with the plea that the company may have received and handed over to each timber-cutter a license with his own name upon it. It is just possible that the company may have applied to the proper officer of the Government for licenses in the names of the men employed to cut timber. Still, although it is not stated that the timber-cutters held licenses made out in their own names, I think that upon the trial it would be necessary to prove that fact, even if not alleged in the pleadings. But I agree that there is no authority for the holders of licenses to enter upon these lands, though upon a different ground from that taken by their Honors. I do not read the definition of Crown lands in the same way as their Honors do. I consider that Crown lands are all lands not parted with for good—not dedicated once for all to a public purpose, or granted in fee simple. I think that the word "dedicated" in the definitions of Crown lands applies only to absolute and permanent dedication. So long as lands are only temporarily reserved from sale, no matter for what purpose, they remain, in my opinion, Crown lands. But apart from that question, it is perfectly clear to me that the defendant had no right to enter on the lands mentioned in the plea. I cannot understand what possible meaning the words, "a reserve for the preservation of timber," can have, unless it is intended to keep the timber growing on the ground and to prevent its being cut by anyone. The construction contended for by Mr. *Davis*, that the timber is to be preserved for the purpose of being cut, seems to me utterly unintelligible. Why, what would be the use of reserving the lands? Section 31 of the Occupation Act gives the Government the power to grant licenses to cut timber on *any* Crown lands. Why, then, reserve them? I think that the Government would have to cancel the reserve before they issued a license to cut timber. I cannot see how the fact that the timber was cut for the Deniliquin and Moama Railway Company would make its cutting a public purpose. But the timber is not even cut for the company—it is simply the case of private persons entering into a contract to cut timber with the defendant, a private person, in his private capacity and for his own private gains, and there is no public purpose to be served at all. It is a purely private transaction, done entirely for the defendant's benefit. When we see that the object of these timber-cutters was expressly to cut down growing trees, it appears to me directly contrary to the reservation. And I think that "dedicated" in Regulation 97 must mean dedicated for any temporary purpose; otherwise how could the lands be called Crown lands? If they were dedicated permanently they would have ceased to be Crown lands. The

regulation therefore distinctly excepts lands temporarily dedicated, and as the Governor can only issue licenses subject to the regulations, and as this regulation has been infringed, I think that the defendant had no power to enter on the land under these licenses, and that the plea cannot be sustained.

PER CURIAM. *Judgment for the plaintiff.*

Attorneys for the plaintiff—*McCarthy, Robertson and Fisher.*

Attorneys for the defendant—*Slade and Smith.*

THE BRISBANE OYSTER FISHERY COMPANY *v.* EMERSON. (*a*)

Foreign judgment—Defendant resident in New South Wales—Contract made in Queensland—19 *Vict., No.* 12.

Where a defendant resident in New South Wales made a contract in Queensland, was sued in Queensland after his return to New South Wales, was served with process in Sydney, but did not appear, and judgment was signed against him, the Court refused to issue execution against him upon a memorial of the judgment under the Act 19 Vict., No. 12.

An application was made in Chambers to HARGRAVE, J., under the Act 19 Vict., No. 12, to issue execution upon a judgment of the Supreme Court of Queensland against the defendant at the suit of the plaintiffs (an incorporated company), a memorial of which judgment had been filed in accordance with the Act. The learned Judge dismissed the application with costs.

Darley now moved to make absolute a rule *nisi* obtained by him on the 19th of March, calling on the defendant to shew cause why the order of HARGRAVE, J., should not be rescinded, and why execution should not issue upon the judgment. He read affidavits by Mr. Chapman (a solicitor of the Supreme Court) verifying the judgment, by the defendant, and by Mr. Cohen (secretary to the plaintiffs), in reply. From the affidavits the following facts appeared:—The defendant entered into a contract in Brisbane, where he was temporarily on a visit, with the plaintiffs for the supply to him of a certain quantity of oysters to be delivered "free on board" at Brisbane, and the freight to be paid by the defendant. It was alleged that some of the oysters delivered by the plaintiffs had not been paid for, and an action in respect of such non-payment by the defendant was commenced in the Supreme Court of Queensland. The defendant

(*a*) March 23.

was at the time of the commencement of the action, and had been for some years previously, resident in New South Wales. He was served with the writ in the action in Sydney, but did not appear and took no steps to defend himself against the plaintiff's claim. Judgment was signed against him in the Supreme Court of Queensland.

Darley, for the plaintiffs, in support of the rule. The point raised by this application has never yet been decided. The defendant, though a resident in Sydney, entered into a contract in Brisbane, and the question is whether the Queensland Court had not jurisdiction to pronounce judgment against him. We may put out of consideration the case of *Warner* v. *Fischer* (*b*), decided in this Court. [HARGRAVE, J.: I decided this application in Chambers upon the principle of *Fischer's case*, which is, that where a person has not defended the action on the merits, but is willing to contest his liability if the action is brought against him here, he ought to have an opportunity of doing so.] But in *Warner* v. *Fischer* there was a violation of natural justice. It is a different case where the Court had no jurisdiction, or where no notice of the proceedings against him was given to the party. The question now raised was not determined in *Warner* v. *Fischer*, nor in any other reported decision. The Queensland Court had jurisdiction in this matter. They have a section which corresponds with section 16 of our Common Law Procedure Act. [SIR JAMES MARTIN, C.J.: That section was adopted both here and in Queensland from an Imperial Act. There is no doubt that the Imperial Parliament can bind British subjects all over the world, but can a Colonial Legislature bind anyone beyond the limits of their own colony?] We admit that the Queensland Parliament cannot bind persons resident in this colony; but whether there is coercive jurisdiction or not, any Colonial Legislature can provide for the issue of writs out of the jurisdiction.

Salomons (who appeared to shew cause on behalf of the defendant against the rule) objected that foreign law must be shewn by affidavit before the Court could recognise it. There was no evidence before the Court that the law of Queensland was as stated by Mr. *Darley*.

SIR JAMES MARTIN, C.J. It is not necessary for Mr. *Darley's* case to shew what the law of Queensland is. Of course it will be presumed, unless the contrary is shewn, that the judgment was regular according to the law of Queensland. No doubt we can take no judicial cognizance of the Acts of Parliament of other colonies.

(*b*) 13 S. C. R.

Darley. What would be the consequences of the refusal of this Court to issue execution? There would be retaliation in the other colonies, and section 16 of our Common Law Procedure Act would become a dead letter. In *Schibsby* v. *Westenholz* (*c*), which is a case at first sight against this application, the defendant had never been in the foreign country, nor was the contract made there. And *Blackburn*, J., says, at p. 161, in enumerating the cases in which a defendant would be bound by a foreign judgment:—"If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued." The point, therefore, is treated as never having been decided, and the inclination of opinion of the Court is in favour of the liability of the present defendant. [SIR JAMES MARTIN, C.J.: *Blackburn*, J., does not say "if the defendant left before the cause of action arose."] No doubt that makes a difference. In England the question of enforcing foreign judgments is regulated solely by the practice of the Courts, but in this colony it is regulated by statute. There is not only the *lex non scripta*, as in England, but the *lex scripta*. If the Court has power to enforce this judgment, it is clearly one which ought to be enforced. This case is not at all like those in which the defendant had no opportunity of defending himself. It was most reasonable that the action should be brought in Queensland. The contract was made in Queensland, and was to be carried out entirely in Queensland; it would have to be construed according to the law of Queensland; all the witnesses were resident there. In *Copin* v. *Adamson* (*d*) a person resident in England, and not served with process, was held to have contracted himself into the liability to be sued in France. Here there is a consent to be implied from the fact that the defendant made the contract in Queensland. He must be taken to have consented to be sued in the country where he entered into the contract, and according to the law of which the contract would have to be construed. In *Story's Conflict of Laws* (*e*), it is stated that the Courts of England may disregard a foreign judgment if it appears on the record: (1) to be manifestly contrary to natural justice; or (2) to be based on domestic legislation not recognised in England or other foreign countries; or (3) is founded on a misapprehension of what is the law of England; or (4) if such judgment proceeds upon a distinct refusal to recognise the laws of the country under which the title to the subject matter of the

(*c*) L. R. 6 Q. B. 155. (*d*) L. R. 9 Ex. 345; affirmed on appeal L. R. 1 Ex. Div. 317. (*e*) s. 618 d.

litigation arose. This case does not come within any of these exceptions. [HARGRAVE, J.: Another exception ought to have been stated, viz., if the defendant, being resident in this jurisdiction, expresses his willingness to be sued in this Court.] It may be said that the power given by the Act 12 Vict., No. 19, to issue execution is discretionary, and may be exercised or not at the pleasure of the Court. But the discretion must be a judicial discretion, or there would be no uniformity of decision.

Salomons shews cause. The question of law has really been decided, and is taken for granted in the cases referred to by the other side. *Story* (*f*) says: "In order to found a proper ground of recognition of any foreign judgment in another country, it is indispensable to establish that the Court pronouncing judgment should have a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity." Here there is no jurisdiction in the Queensland Court over the party defendant. The provisions of the Common Law Procedure Act as to service out of the jurisdiction are nullities so far as regards the other colonies. The test is, is a person bound to appear to the action? There is a difference between an action on a judgment and the summary proceeding provided by the 19 Vict., No. 12. If the learned Judge had granted this application in Chambers, the defendant would have been shut out from defences which would have been open to him in an action brought on the judgment. He might then have raised the defence of want of jurisdiction. But the Act 19 Vict., No. 12, only applies where the defendant is domiciled in the other colony and leaves it to evade a judgment against him, not where he is only a visitor to that colony and goes away before any cause of action arises. The title and preamble of the Act both shew that this is the true construction. It can have no application where the defendant has throughout been domiciled in this colony. We say that this point was decided in *Schibsby* v. *Westenholz*. The real effect of that decision is that a person must be sued in a country where he is resident and domiciled. This appears from the concluding words of the judgment: "We think, and this is all we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of a French tribunal." That is the defendant's case here. *Copin* v. *Adamson* clearly shews that no inference of consent to be sued in the other country is to be drawn from the fact of the contract having been made there; for if there had been an implied consent, the question whether the defendant was bound by his express consent would have been

(*f*) Conflict of Laws, s. 586.

immaterial. The contract in that case was made in France, but it was never argued that the consent of the defendant to be sued there could be implied from that fact. This case is not on all fours with *Warner* v. *Fischer*, but the principle involved is the same, viz., whether a resident in Sydney can be dragged away to answer a cause of action in another colony. There is a technical objection which is fatal to this application. It is not stated in Mr. Chapman's affidavit that he is the plaintiffs' attorney. The affidavit must, under the Act, be made by the plaintiffs or their attorney, and, as they are a corporation, he must be appointed under seal. [This point was not pressed.] He also referred to *Kent's Commentaries* (*g*), and *Burge's Colonial Law* (*h*).

Darley, in reply. When *Story* says that a foreign Court must have a jurisdiction over the person, he does not mean coercive jurisdiction. In *Copin* v. *Adamson* the French Court had no jurisdiction over the defendant in that sense. The Court cannot look to the title or preamble of an Act to construe its contents The title is no part of the Act, and the preamble never cuts down the clear words of an Act. Though a particular mischief (such as the evasion of judgments in other colonies) is recited in the preamble as the motive for legislation, the legislative provisions may extend beyond the mischief recited. The effect of the Act cannot be narrowed by the words of the preamble: *Maxwell on Statutes* (*i*). The Act is quite large enough to embrace the present case.

Sir James Martin, C.J. This application is made to the Court under the Act 19 Vict., No. 12, which authorises a Judge of the Supreme Court or the Court itself, on certain facts being deposed to, to make an order giving validity to a judgment obtained in any other of the Australasian colonies. By the Common Law, which still prevails in England, there being no such Act as we have, foreign judgments (and the judgments of the Courts of other colonies must be taken here to be foreign judgments) cannot be enforced as judgments, but may be sued upon in the English Courts. The Colonial Act was passed to do away with the necessity for suing, and a more summary method of proceeding was provided. This Court has already held that a Judge in exercising the power given by the Act should be guided by the same principles as would guide an English Court in an action on a foreign judgment, and that the same considerations as would prevent an English Court from giving effect to a foreign judgment ought to prevent a Judge of this Court from granting an application to issue execution made under this Act. In other words, the Act has left the law of foreign judgments exactly

(*g*) p. 120. (*h*) Vol. III. p. 1050. (*i*) p. 39.

where it was, except in so far as it provides a more summary remedy. Here an action was brought in Queensland against a defendant who had never resided in Queensland; who, it appears from the affidavits, had several times visited Queensland, but was never domiciled there. It also appears that the cause of action arose out of a contract which the defendant, when temporarily in Queensland, made with the plaintiffs. When the cause of action arose, and also when the action was commenced, he was residing in Sydney. Process was served upon him here; he did not appear to the writ, and judgment was afterwards signed against him. That is the judgment that we are now asked to enforce.

This application raises a question of very great importance, and it has received from us the very best consideration. It is not altogether a new question in this Court, as we have several times had occasion to consider the authorities which have been cited. I would first refer to s. 539 in *Story's Conflict of Laws*, the work of a writer of the highest authority, who may be said to have systematised, for the first time, this branch of the law. [His Honor read the whole section.] That is a statement of the general principle. To that general statement of the law there are, as every one knows, some exceptions. There have been cases where persons, who have not been resident in the foreign country, who have not even had notice of the proceedings, have been held bound by the foreign judgment. Wherever persons have, either expressly or by implication, agreed to be sued in a foreign country by a foreign tribunal, then, notwithstanding the general principle, that the judgment of a Court cannot bind persons residing out of its jurisdiction, they are liable in an action on the judgment obtained against them in their absence, or even without their knowledge. But, subject to these well known exceptions, the principle laid down by *Story* holds good. That principle came under the consideration of Lord Chancellor *Westbury* in 1863, in the case of *Cookney* v. *Anderson* (*j*), which was followed by him in two other cases reported in the same volume. The question there was whether the Court of Chancery had power to order service of a bill on the defendant out of the jurisdiction, and Lord *Westbury* held that it had no jurisdiction to make the order. In the case of *Drummond* v. *Drummond* (*k*), Lord Chancellor *Chelmsford* and Lord Justice *Turner* over-ruled *Cookney* v. *Anderson*, but expressly left untouched the general principles, as to extra-territorial jurisdiction, laid down by Lord *Westbury*. The general propositions stated by him entirely confirm the passage from *Story* to which I have referred, and contain a

(*j*) 1 D.G., J. & S. 365. (*k*) L.R. 2 Ch. App. 32.

remarkably clear statement of the law. He says, at p. 379, "This jurisdiction (*i.e.*, against natural born subjects resident abroad) depends on the statute or written law of the country. Where it is not expressly given, it cannot be lawfully assumed. If such a law does not exist, the general maxim applies—*extra territorium jus dicenti impune non paretur.*" And, again, at p. 380, "The right of administering justice is the attribute of sovereignty, and all persons within the dominion of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served in the territory of another, and summons a foreign subject to his court of justice, it is, in fact, an invasion of sovereignty, and would be unjustifiable, unless done with consent, which is assumed to be the fact if it be done in a case where a foreign judgment would, by international law, be accepted as binding. For, besides the general maxim which I have already cited, and which limits the jurisdiction of every tribunal to its own territory, there is another general rule, *actor sequitur forum rei*,—and both are violated when the territorial Judge cites, and pronounces a judgment against, a person who does not appear, and is absent in another territory." This judgment of Lord *Westbury's* touches the question, how far Acts of the Imperial Legislature, intended to apply to England, would give jurisdiction over the person or property of a British subject residing in one of the colonies. That question, however, does not arise in this case; for, whatever the powers of the Imperial Legislature over all British subjects, wherever they are, may be, it cannot be contended for a moment that any colonial Legislature can bind persons residing out of its colony. This difficulty has been practically felt whenever it has been proposed to establish a colonial navy, inasmuch as our Legislature has no coercive jurisdiction outside the limits of our own territory. When *Cookney* v. *Anderson* was over-ruled, these observations were used by Lord *Chelmsford*:—"The general principles laid down by Lord *Westbury*, in *Cookney* v. *Anderson*, with regard to the exercise of extra-territorial jurisdiction by the Courts of one country in another, apply rather to compulsory process than to the mere notification of proceedings. It may justly be considered to be an invasion of the jurisdiction of a country whenever an attempt is made to force one of its subjects, or any one under its protection and temporary allegiance, before a foreign tribunal. But the Legislature of every country has power to regulate the course of proceedings in its own Courts." A distinction is here drawn between process for the purpose of going on to judgment, and process for enforcing the judgment. And Lord Justice *Turner* says, at p. 46:—"If, in consequence of

these orders, any degree be made against a person out of the jurisdiction, it would be for the Courts of the country in which he may reside to determine whether the decree should be enforced against him." There is the distinction. In this case there does not appear to be any statute in Queensland which, upon the breach of such a contract as the present, enabled the plaintiffs to sue the defendant in Queensland wherever he may be resident, and to serve him with process by leaving the writ at a public office, or in any of the other ways which are authorised in some countries when the defendant is out of the jurisdiction. Had there been such a statute there might have been some ground for saying that the contract was made subject to the law of Queensland, and that the defendant must be taken to have contracted to be sued in that manner. But, in the absence of any such law, it appears to me that the general principle laid down by *Story* applies to and governs this case. We have been referred to a passage from the judgment of Mr. Justice *Blackburn* in *Schibsby* v. *Westenholz.* The first remark to be made is that his observations do not amount to a decision, or even an opinion. It is a mere inclination of opinion on his part on a point which had not been argued, and on which he desired to hear argument, and is of no assistance to us whatever. But, irrespectively of that, his remarks must be taken, with reference to the law of France, as proved in that case, under which a French subject could sue a foreigner, though not resident in France, and recover judgment against him; and that for this purpose an alien, if resident in France, was considered by law as a French subject. But here there is no evidence of any such law in Queensland, unless we are prepared to hold now, for the first time, that anyone going to a foreign country and making a contract there makes himself *ipso facto* liable to be sued in that country. There are Acts in Queensland providing that persons may be served out of the jurisdiction, but none providing that judgments against foreigners shall be binding. If, in the absence of any statute to that effect, we should hold the defendant liable to be sued in Queensland from the mere fact that he made the contract there, we should be flying in the face of recognised international law, and violating the principle laid down by *Story* and cited with approval in so many cases. We should then hold that a man may be dragged from his home and the place of his domicile at an enormous expense—from the place where his witnesses are living, and where his business is being carried on—or else must have charges proved against him behind his back without an opportunity of answering them. Such a state of things would be in the highest degree unjust, and as there is no law, in my

opinion, to sanction it, I must refuse to accept this inclination of opinion as binding on us. There is another observation of Mr. Justice *Blackburn* in the same case with which I do not altogether agree. I think we are not *bound* to enforce these foreign judgments. I think they are examinable. No doubt the judgments of foreign civilised tribunals may be sued upon, and *primâ facie* a foreign judgment raises an obligation in the defendant to pay; but the judgment is still examinable, at any rate on the grounds of fraud or irregularity. And here we are called upon to enforce a judgment against a defendant who is not amenable to the jurisdiction of Queensland either in person or property. He is neither domiciled there, nor has he property there which might confer a jurisdiction upon the Courts of Queensland. I do not think the fact that the writ was served on the defendant of any moment. Service was nothing unless he thought fit to obey it. He did not think fit to submit to the foreign jurisdiction, as he would have by appearing; the plaintiffs went on with the action, and this judgment was obtained against him behind his back. I think his Honor Mr. Justice *Hargrave* was quite right in refusing to enforce it, and that this rule ought to be discharged with costs.

HARGRAVE, J. I altogether concur with the *Chief Justice* Independently of all authority, the general principle of law is that justice cannot be administered unless the justice of other countries is recognised in our Courts, and unless their judgments are recognised and respected by our Judges. We must treat justice as universal, and assist the persons who administer justice in other countries in carrying out their judgments, so long as they are in accordance with the general principles of natural justice. It would be impossible for commerce to go on in peace and quietness unless contracts made in one country could be enforced elsewhere; and that is evidently what Mr. Justice *Blackburn* means when he says "that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are *bound to enforce.*" That is, of course, bound to enforce judicially according to law, by allowing an action to be brought upon it, but not bound to issue execution on it at once and to prevent the defendant from having any opportunity of defending himself. The broad principles of natural justice ought to guide us upon this point in preference to all authorities. The circumstances in this case make it impossible to put out of consideration the decision of this Court in *Warner* v. *Fischer*. We there laid down the principle that if a defendant is willing to defend himself here, we

should encourage him to do so, and not deprive him of any opportunity of trying the question of the validity of the judgment in our Courts. However good the judgment may be, or however right and proper upon the merits of the case, so long as the defendant did not appear and never had a trial, we ought to say:—"Bring your action upon the judgment; we cannot take away from the defendant his right to be heard, and to have his case tried in open Court." It ought to be clearly understood that if a party to a contract made in another jurisdiction wishes to enforce it in this summary manner, he must be prepared to shew that the defendant expressly agreed to waive the question of jurisdiction; otherwise the defendant shall not lose his natural right to be sued in the Courts of the country where he resides. It does not matter how good or just the judgment is. The plaintiffs, before they can obtain execution here against a man residing here, ought to shew either that he has agreed to be sued elsewhere, or that they had given him an opportunity of defending the action here. I have no doubt that my order was quite right, and that the rule ought to be discharged.

FAUCETT, J. I am of the same opinion. I think that under the Act 19 Vict., No. 12, if a judgment is properly and regularly obtained, and an application is made to a Judge to issue execution, and nothing appears before him to shew that the judgment was improperly or irregularly obtained, he ought to exercise his discretion in granting the application. But where facts appear which would prevent an English Court from entertaining an action on the judgment, the same considerations should influence a Judge of this Court in refusing the application. I think the discretion given by the Act is a judicial discretion to be exercised according to fixed principles of law. Then, what does a judgment properly obtained mean? It does not merely mean that all the usual steps necessary to be pursued have been pursued. Here I assume that they were all regularly and duly taken. But, when the defendant never appeared, we have to consider what was the effect of the service of process upon him. In my opinion it was only a notice to him to appear if he chose. And is a person, who was not resident in Queensland, who had always been resident here, and who did not appear in Queensland when summoned, bound by the judgment pronounced in his absence? I think not; and I also think that the mere fact of making a contract in another country does not involve an agreement to be bound by decisions of the Courts of that country. The Act 19 Vict., No. 12, was, I think, not intended by its framers to apply to a case like the present, or to have any farther application than to persons removing from another colony after judgment recovered against them there.

Still, whatever was the original intention of the Legislature, we have to carry out the statute, according to its plain language, as it stands, and I think that, whenever a judgment has been regularly obtained, it ought to be carried out by this Court, whether the defendant was resident in Queensland at the time of the judgment or not. Mr. Justice *Blackburn's* judgment, in the case in the Queen's Bench, is a sufficient proof that the law is not as Mr. *Darley* contended, and that the defendant was not bound to attend the trial in Queensland. I do not think much of the willingness of the defendant to defend the action here; the question rather is whether he was bound to attend in Queensland. I think he was not so bound, and that all the circumstances of this case justified his Honor Mr. Justice *Hargrave* in the view which he took upon the application in Chambers.

Rule discharged with costs.

Attorneys for the plaintiffs—*Daintrey and Chapman.*

Attorneys for the defendant—*Allen, Bowden, and Allen.*

OWSTON *v.* THE BANK OF NEW SOUTH WALES. (*a*)

Practice—Privy Council Appeal—Appealable Value.

Where the damages in an action for malicious prosecution amounted to £500, the Court fixed the terms of an appeal to the Privy Council from an order discharging the rule for a new trial.

Butler, Q.C. (*Davis* with him), moved for leave to appeal to the Judicial Committee of the Privy Council from the order of this Court, discharging, with costs, the rule *nisi* for a new trial in this action.

M. H. Stephen (*Knox* with him) objected that the amount of the verdict was not over the value of £500. The Order in Council only gave an appeal where "the sum or matter at issue" was "above the amount or value of £500." There was no claim in this action, "to or respecting property or any civil right," in the terms of the second branch of the clause.

Butler. As a matter of fact, judgment is signed for £531, being the amount of the verdict with interest. In *Dines* v. *Wolfe* and *Brasyer* v. *Maclean*, the verdicts were for £500, and the appeals took place.

PER CURIAM (*b*). We think this case comes within the rule allowing an appeal. We order that the judgment be carried into execution, the plaintiff giving security, to the satisfaction of the Prothonotary, to perform such judgment as the Privy Council may pronounce, in the sum of £1000. The defendants to give security in the sum of £300 for the costs of the appeal.

(*a*) March 26. (*b*) SIR JAMES MARTIN, C.J., HARGRAVE & FAUCETT, JJ.

THE QUEEN *v.* CHARLIE COMBO. (*a*)

Crown case—Assault with intent to commit a Rape—Evidence.

A prisoner was convicted of an assault with intent to commit a rape. The evidence of the assault was that a woman awoke in the night, felt a hand on her bare right shoulder, and found the prisoner (an aboriginal) lying behind her, in his shirt. *Held*, that the evidence was not sufficient to sustain the conviction.

The following case was stated for the opinion of the Judges, under the Act 13 Vict., No. 8, by the Chairman of Quarter Sessions holden at Narrabri :—

The information in this case charged the prisoner with having at M—— on the 19th January, 1877, assaulted M. E. M. with intent to commit a rape upon her. It appeared that about the time of the commission of the assault the weather at M. was extremely hot. When the family retired to rest at about 12 o'clock, Mr. M. lay down in the store verandah about 30 yards from the house, Mrs. M. and her six children lay down in the front verandah of the house, and a young lady named L. lay down in the hall close to the back-door. About a quarter of an hour after, a black, having on only a shirt, came and stood in the back door-way of the hall and asked Miss L. if he might come in and sleep with her. She told him that if he did not go away at once she would tell Mr. M. She then retired to a room, and the black went away. About two hours after this, at about 3 o'clock in the morning, Mrs. M., who was sleeping on her right side, was awakened by feeling a hand laid upon the top of her bare right shoulder. She turned round or over, and her arm came in contact with the neck of a black, who was lying behind her in his shirt, leaning on his elbow. She cried out—"You black wretch!" whereupon the black made off, and Mrs. M., rising, chased him to as far as the end of the verandah. The next morning the prisoner was told by his master, a Mr. K., to come up to the house, when he was positively identified by both Mrs. M. and Miss L., as the man who had come to them in the night. When the police proceeded, a few days afterwards, to arrest the prisoner at a blacks' camp, he ran away from them and endeavoured to conceal himself behind a log. I directed the jury that if they found that the prisoner had, at any time during the assault, an intent to have intercourse with Mrs. M. against her will, even though he had subsequently abandoned such intention, they should find him guilty of assault with intent to commit a rape; or they might, if they thought the facts sufficiently indicated an indecent intent, find him guilty of an indecent assault; or they might find him guilty of a common

(*a*) March 23.

assault. After the jury had retired, Mr. *Heydon*, for the prisoner, requested me to reserve the following points:—1. That there was no evidence to go to the jury on the charge of assault with intent to commit a rape; 2. That there was no evidence to go to the jury to support a conviction of an indecent assault. The jury found the prisoner guilty of an assault with intent to ravish. The question, therefore, for the consideration of the Court is whether there was any evidence to support such a verdict.

F. W. MEYMOTT.

No counsel appeared for the prisoner.

Windeyer (A.G.), who appeared for the Crown, admitted that the conviction could not be supported.

PER CURIAM (*b*). There is no evidence whatever of the intent charged. It is not necessary to consider whether upon this information the prisoner could have been convicted of an indecent assault.

Conviction quashed.

LYONS *v.* COHEN AND ANOTHER. (*a*)

Bill of Sale—19 *Vict., No.* 2—*Non-registration*—*Fraudulent preference under* 5 *Vict., No.* 17, *s.* 8—*Security for past debt.*

J. and C. gave a bill of sale to the defendant to secure a *bona fide* advance, and it was agreed that, to avoid registration under the Bills of Sale Act (19 Vict., No. 2), fresh bills of sale for the same consideration should be given by way of renewal within 30 days of each other. When the last three bills of sale were executed, J. and C. were actually insolvent. The last bill of sale was registered, and possession was taken under it by the defendants. The estate of J. and C. was afterwards sequestrated. *Held*, in an action by the official assignee of J. and C. for the goods taken under the bill of sale, that the last bill of sale was a security for a past debt, and, therefore, had the effect of preferring the defendants to other creditors within the 8th section of the Insolvency Act, and was void against the creditors.

The plaintiff sued as official assignee of the insolvent estate of Johnson and Carroll, who were trading in partnership as hosiers, to recover the value of certain goods which had been seized and sold by the defendants under bills of sale granted to them by the insolvents. The declaration contained the usual counts framed upon the 8th section of the Insolvency Act, 5 Vict., No. 17, and a count in trover.

(*b*) SIR JAMES MARTIN, C.J., HARGRAVE & FAUCETT, JJ.
(*a*) 26th March.

It appeared at the trial, that on the 29th February, 1876, Johnson and Carroll borrowed a sum of £500 from the defendants, and on that day gave them a bill of sale for the amount over their stock in trade, furniture, and shop fixtures; being substantially all the property they were possessed of. Further advances were subsequently made to the insolvents, and some payments were made by them on account. The last advance was made on the 21st July, 1876, when a second bill of sale was given in the same terms and over the same property as the first, except that the amount secured was £655, which was the indebtedness of the insolvents to the defendants on that day. It was arranged between the insolvents and the defendants that the bill of sale given by the former should not be registered, but that renewals should be given from time to time. In accordance with this arrangement, fresh bills of sale were executed by the insolvents on the 11th August and 8th September, 1876, similar in terms to the previous bills, and without any further advance being made by the defendants. On the 4th October, Carroll, in accordance with a previous promise, gave notice to the defendants that he and his partner intended to call a meeting of their creditors, and the defendants thereupon immediately registered the bill of sale of the 8th September, and on the same day took possession of the goods comprised in it; and subsequently sold them for £500. Johnson and Carroll voluntarily sequestrated their estate on the 9th October, 1876, and it was admitted that on and since the previous 21st July they were in insolvent circumstances.

At the trial, before FAUCETT, J., at the February sittings, it was arranged by consent that the jury should find a verdict for the plaintiff, and assess the value of the goods, and that all questions of law respecting the validity of the transactions between the insolvents and the defendants should be reserved for the determination of the Full Court.

The jury found a verdict for the plaintiff for £640.

The defendants now moved to make absolute a rule *nisi* for a new trial, or to enter a verdict for them, obtained on the 5th instant.

M. H. Stephen, *Salomons*, and *Pilcher*, in support of the rule. The Bills of Sale Act has nothing to do with this case, for the defendants took possession of the goods before the sequestration. There is no necessity for the holder of a bill of sale to register if he takes his chance of being able to take possession of the goods before the sequestration. There is nothing wrong in an agreement to renew in order to save the grantor's credit. *Ramsden* v. *Lupton* (*b*) shews that the subsequent bills of sale were

(*b*) L. R. 9 Q. B. 17.

given for a good consideration; the original consideration for the first bill of sale runs through the whole transaction. In *Ex parte Cohen* (*c*), relied upon by the other side, there was an act of bankruptcy before the giving of the last bill of sale. [SIR JAMES MARTIN, C.J.: But is it not there decided that the last bill of sale was to be deemed given for an antecedent debt?] Yes; but in that case the holders of the bill of sale relied on the registration. Here we do not rely upon it, for, as we had possession of the goods, registration is immaterial. Suppose there had been no renewals at all, the defendants would still have had a good title after taking possession of the goods. And how can the agreement to renew or the renewals make any difference? The defendants were practically and in equity enforcing the first bill of sale. It would be going further than has ever been held, and would be highly technical, to hold that this transaction was a preference under the 8th section.

Butler, Q.C., *Darley*, and *C. B. Stephen* shew cause. If the argument of the defendants is to prevail, no bill of sale will ever be registered. The 8th section of our Act is in much stronger terms than the 95th section of the last English Bankruptcy Act. The 6th section in the Bankruptcy Act makes any fraudulent conveyance, gift, or delivery of his property an act of bankruptcy. *Ex parte Foxley* (*d*) and *Ex parte Stevens* (*e*) were decided upon this section. The 5th section of our Insolvency Act makes a "fraudulent alienation, transfer, gift, surrender, delivery, mortgage, or pledge," an act of insolvency. Therefore, by these decisions the transaction is void against the creditors under the 5th section, without relying on the 8th section. *Ex parte Fisher* (*f*) is directly in point in this case. *Smale* v. *Burr* (*g*) is only a decision upon the effect of a similar transaction as between the holder of the bill of sale and the executive creditor. Here the last three bills of sale were admittedly given when the grantors were insolvent. If they were given for an antecedent debt, they are in the nature of a preference, and void against the creditors. *Ex parte Cohen* and *Ex parte Stevens* shew thatthey must be treated as having been given for a past debt. *Stansfield* v. *Cubitt* (*h*) was also referred to.

SIR JAMES MARTIN, C.J. In this case the plaintiff, Lyons, is the official assignee of the estate of two persons named Johnson and Carroll, whose estate has been sequestrated as insolvent. The action is brought to recover goods alleged to belong to Johnson and Carroll's estate. The facts were admitted at the trial, and it was agreed that the Court should decide whether

(*c*) L. R. 7 Ch. App. 20. (*d*) L. R. 3 Ch. App. 515. (*e*) L. R. 20 Eq. 786. (*f*) L. R. 7 Ch. App. 636. (*g*) L. R. 8 C. P. 64. (*h*) 27 L. J. Ch. 266.

upon the facts and law of the case the plaintiff is entitled to retain his verdict.

The defendants, who are money lenders, lent some £600 to Johnson and Carroll, and at the same time as the advance was made, took a bill of sale over all their goods as security. Our Bills of Sale Act (19 Vict., No. 2) requires a bill of sale to be registered within 30 days, otherwise, in certain contingencies, the bill of sale is rendered void. This registration has the effect of injuring the credit of the person giving the bill of sale, and in order to prevent publicity, an arrangement was made between Johnson and Carroll and the defendants that the bill of sale given in the first instance should not be registered, but that others should be given from time to time within 30 days of each other to avoid the necessity of registration. Several bills of sale were accordingly given in this way, and it is admitted that when the last three were executed Johnson and Carroll were insolvent. The last bill of sale only was registered, and possession of the goods was taken thereunder by the defendants just before the surrender of their estate by the insolvents. No other debt was secured by the several bills of sale except the original debt already mentioned. The question is whether the property passed to the defendants under the last bill of sale or all the bills of sale together, so as to prevent the plaintiff from recovering it for the creditors.

There can be no doubt that if the controversy here had been between these defendants and an execution creditor of Johnson and Carroll, the last bill of sale given by way of renewal would have been good and binding, and the transaction would stand, on the ground that there was a good consideration to support it. The last bill of sale would not be regarded as a separate and independent security, for, as each bill of sale came into operation, the earlier bills of sale were done away with altogether. The principle on which the case of *Smale* v. *Burr* was decided, was that, in the case of a series of bills of sale like the present, the original good consideration runs throughout, and will be sufficient to support the last of them, equally as well as the first, against an execution creditor. And the same has since been held in a case in the Exchequer Chamber—*Ramsden* v. *Lupton*. The Court there referred to two cases in Chancery, and, notwithstanding those cases, upheld a transaction similar to that in the present case. But now we have to deal, not with the case of an execution creditor claiming against the transferee under a bill of sale, but with the case of the general body of the creditors in insolvency. The cases on this point are *Stansfield* v. *Cubitt*, *Ex parte Cohen*, and *Ex parte Stevens*. In each of these cases there was an original

bill of sale followed up by others from time to time so as to avoid registration, just as in the present case. It was held in all these cases that the giving of any bill of sale after the first was, under the circumstances, the giving a security for a past debt. That, in England, amounts to an act of bankruptcy and a fraudulent transaction, and will not be supported. In each of these cases it became, therefore, material to consider whether the security was or was not given for a past debt, and the Court held that it was. That was the very essence of the decision. The Court in each case must have thought that when the first bill of sale was cancelled by the second there was, and had been for some time before, a past debt, and that the subsequent bills of sale were given to secure such past debt. No doubt, against that view, there is the strong argument that at no point of time was there an unsecured debt, because each bill of sale was in operation until superseded by the succeeding one; and, perhaps, in the absence of these decisions, it might be difficult to say that that argument ought not to prevail. But I find it impossible to resist the force of these decisions. Here is a Court, which is entitled to our fullest respect, holding the same principle, not once only, but on three different occasions. I am compelled to hold that the bill of sale, under which possession was taken by these defendants, was a security for a past debt.

And if that bill of sale was given to secure a past debt, what follows? It follows that it is a violation of the 8th section of the Insolvency Act. It is conceded that Johnson and Carroll were actually insolvent when the last bill of sale was given, and that they had other creditors besides the defendants. The transaction must, therefore, have had the effect of preferring the defendants to the other creditors of the insolvents, and is void under the 8th section. It becomes unnecessary to decide whether it is also void under the 5th section, as being an act of insolvency. As the last bill of sale amounted, in my opinion, to a preference of the defendants to other creditors, within the terms of the 8th section, I think the plaintiff was entitled to recover in the action, and the rule ought to be discharged.

HARGRAVE, J. There is a very great difficulty in applying the rules of the Equity Courts in England in their Bankruptcy Jurisdiction to cases falling under our Colonial Insolvency Acts. In this colony there is no distinction between traders and non-traders; we do not say that what may be honest in a non-trader is dishonest in a trader. But in this case the insolvents are traders; so that in this particular case the distinction does not arise. I ground my decision on the broad justice of the case and the policy of all Bankruptcy and Insolvency Acts, which is to secure the

property of the insolvents for the benefit of all their creditors, equally. And the renewal of these bills of sale appears to me to be against the policy of those Acts, so far as they relate to goods in the order and disposition of the insolvents. Under the Act goods left in the order and disposition of the insolvents go to the assignee for the benefit of the general creditors, and this case, it seems to me, stands on the same footing. I daresay there was nothing fraudulent about the agreement to renew, and we must suppose that all parties were acting honestly and straightforwardly, as they thought, but it was an agreement not to carry out a very useful Act of Parliament. I concur with the *Chief Justice.*

FAUCETT, J. I have no doubt on this point, having regard to the English decisions. It is quite clear to my mind that the transaction was within the 8th section. The only question for our decision was whether it had the effect of preferring the defendants to other creditors of the insolvents. If given for a past debt, it clearly had that effect. The Courts of England have drawn a distinction between execution creditors and assignees in bankruptcy, as representing all the creditors. A bill of sale, given under the same circumstances as the last bill of sale in this case, was held good as against the execution creditor, because he stood in the shoes of the assignor, and the bill of sale was undoubtedly good against the assignor. But it is quite different, when the effect of the Bankruptcy Acts has to be considered, their chief object being to distribute the goods of the bankrupt among all his creditors alike. I see no reason to question the honesty of this transaction in its inception. No doubt the money was advanced, and the first bill of sale was given for good consideration. But I fail to see how the agreement to renew can be treated as an honest agreement. What is the object of it? Is it not intended to keep the other creditors of the insolvent in the dark as to their position? I think this Court ought not to encourage such transactions; for, if it did, the insolvent law would be practically useless. As to the decisions: there is no conflict between the cases in Chancery and at common law. The judgment in the last case—*Ramsden* v. *Lupton*—draws the distinction to which I have referred, and supports the Chancery decisions, though it distinguishes them.

Rule discharged with costs.

Attorney for the plaintiff—*Evans.*

Attorneys for the defendants—*Dawson and Son.*

W. JOACHIM *v.* O'SHANASSY. (*a*)

Trespass—Crown Lands Act—Description of Conditional Purchase in Application—Boundaries.

The plaintiff's application for a conditional purchase described one of the boundaries as a line running north-easterly. On the trial of an action brought against the defendant, the lessee of a run, for trespass to the plaintiff's conditional purchase, the *Chief Justice* directed the jury that, inasmuch as there was no "frontage" to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore void; and directed a verdict for the defendant. The jury found a verdict for the plaintiff.

Held (per HARGRAVE and SIR W. MANNING, JJ.; *dissentiente*, SIR JAMES MARTIN, C.J.) that the direction was wrong, and that the verdict was not against the evidence.

Trespass. In this action a rule *nisi* was obtained in June, 1875. The judgments of the Court on the motion for a rule *nisi* in this action, and also in *Annie Joachim* v. *O'Shanassy*, are reported in the Appendix, *post*. *Butler*, Q.C., and *Healy*, for the defendant, supported the rule in June, 1876, and *M. H. Stephen* shewed cause for the plaintiff. The Court reserved judgment.

SIR JAMES MARTIN, C.J. This was an action of trespass to land brought by the plaintiff—an infant—by his next friend, William Joachim, his father. The land in question had formed portion of the defendant's squatting run. On the 19th February, 1873, William Joachim the elder, professing to act as the plaintiff's agent, delivered to the Crown lands agent at Moama, in accordance with the terms of the 13th section of the "Crown Lands Alienation Act of 1861," a written application for the conditional purchase of 320 acres of land, which he described as follows:—

"County of Cadell, parish of Moama, 320 acres, commencing at the north-east angle of the block applied for by George Joachim, *thence north-easterly along the reserve for railway line* 60 chains, thence west about 60 chains 50 links, thence south about 57 chains, and thence east along the northern boundary of the block applied for about 47 chains to the commencing point."

On the same day on which William Joachim the elder delivered this written application to the Crown lands agent, he delivered in several more in the names of other children of his, and, amongst them, two in the names of his sons, Henry Bristow, and George. The south-eastern corner of Henry Bristow's selection was the

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starting point, by reference to which the commencing points of all the others were to be ascertained, and on which their position depended. The description of that lot was as follows:—

"County of Cadell, parish of Moira, or unnamed, 320 acres, commencing at a point opposite, and west of the south-west angle of allotment 58, parish of Moira, and only divided therefrom by the reserve for railway line; thence north-easterly along the reserve for said railway line 60 chains, thence west about 60 chains 50 links, thence south about 57 chains, and thence east about 47 chains to the point of commencement."

The south-west angle of allotment 58, mentioned in this description, was a fixed and easily ascertained point; and the reserve for the railway line was also fixed. It followed, therefore, that the north-western corner, as well as the western boundary line of the land applied for in the name of Henry Bristow Joachim, could be easily ascertained. The description of the land applied for in the name of George Joachim was in these terms:—

"County of Cadell, parish of Moama, 320 acres, commencing at the south-west angle of block applied for by Henry Bristow Joachim, thence north about 57 chains, thence west about 56 chains, thence south about 57 chains, and thence east about 57 chains to the point of commencement."

Comparing these two descriptions of George and Henry Bristow, it would seem that the eastern boundary of the former and the western boundary of the latter are one and the same line, and that the north-eastern corner of George's land is the north-western corner of Henry Bristow's. Henry Bristow's north-eastern corner is, as we have seen, 60 chains 50 links to the westward of the railway reserve. It follows, therefore, that this is the distance of George Joachim's north-eastern angle from that reserve. This angle being the commencing point of William Joachim—the plaintiff's description—it is apparent that the first line which he describes as starting from that point, namely, the line "north-easterly *along* the reserve for railway line 60 chains," is an impossible line, because the commencement of it is 60 chains 50 links to the westward of that line, and it therefore cannot be drawn *along* it. I pointed out this evident mistake in the description to the jury, and told them that they might regard that eastern boundary of the plaintiff's selection as a line running north-easterly, and reject that portion of the description which referred to the railway line. No question turns upon that direction now. I, however, further told the jury that inasmuch as there was no "frontage" to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore

void; and that, consequently, as his case depended entirely upon the validity of his conditional purchase, the verdict ought to be for the defendant. To save expense to the parties, I asked the jury to find specially, as a matter of fact, whether before the expiration of the 20th March—the last day of the month from the time of lodging the written application with the Crown lands agent—the plaintiff had *occupied* any part of the land applied for by him. I further told them that the plaintiff's right to go upon the land, and turn the defendant out of it, depended upon a valid selection by him followed up by actual occupation within the month. They found, contrary to my direction, a verdict for the plaintiff, and they further found specially that the plaintiff's tent was, before the expiration of the 20th March, 1873, pitched to the west of a line running north-easterly from the north-east corner of George Joachim's land, and also to the west of a line drawn due north from that corner.

A new trial is now moved for on the following grounds:—

1. That the plaintiff's conditional purchase was invalid for non-compliance with the Crown Lands Alienation Act of 1861, for that the eastern boundary line, not being a frontage, was described in the written application as a line running north-easterly.

2. That it was invalid because the land, being land without a frontage, was not described as a square, with boundaries directed to the cardinal points of the compass.

3. That it was invalid, inasmuch as the written application was unintelligible and void for uncertainty.

4. That the verdict was against evidence.

5. That it was contrary to the direction of the Judge.

I think, though with some hesitation, that the third ground cannot be sustained, because it appears to me now, as it appeared to me at the trial, that it was right to reject the words "along the reserve for railway line," and so render the description intelligible by making the north-easterly line parallel to the railway line, which I am disposed to think might properly be done.

The first, second, and fifth grounds may be taken altogether The determination of these grounds depends upon the construction of the 17th section of the "Crown Lands Act of 1861," which is as follows:—

"Crown lands conditionally purchased under this Act shall, if measured by the authority of the Government previously to such purchase, be taken in portions as measured, if not exceeding three hundred and twenty acres; and if unmeasured, and having a frontage to any river, creek, road, or intended road, shall, if within the first-class settled districts, have a depth of not less

than twenty chains, and otherwise shall have a depth of not less than sixty chains, and shall have their boundaries, other than the frontages, directed to the cardinal points by compass; *and, if having no frontages as aforesaid, shall be measured in square blocks, and with boundaries directed to such cardinal points.* Provided that should it seem to the Minister to be expedient, the boundaries of portions having frontages may be made approximately at right angles with the frontage, and otherwise modified, and necessary roadways and water reserves excluded from such measurement." The word "frontage" is defined, in the interpretation clause, to mean "frontage to any road, river, stream, or watercourse, which, according to the practice of the Survey Department, ought to form a boundary between different sections or lots of land." In the present case, the eastern boundary line of the plaintiff's selection had no frontage to any "road, river, stream, or watercourse" whatever, and there was no evidence that the "Minister" had authorised that line to be "made approximately at right angles" to any other line, or to be "otherwise modified" in any way whatever. The question, therefore, is, if the plain directions of this section are disobeyed in the matter of the shape of the land, and the direction of the boundaries, is the conditional purchase by the plaintiff nevertheless valid? I am clearly of opinion that it is not. By the second section of the Act it is enacted that, "Any Crown lands may lawfully be granted in fee-simple, or dedicated to any public purpose, under and subject to the provisions of this Act, *but not otherwise.*" There is no power left to the Crown or to its representative to grant land to any one, except under the provisions of this enactment, none of which provisions has the Crown or its representative any authority to disregard. The *right* to make a "conditional purchase" without anybody's consent, and regardless of anybody's discretion, is conceded by this act for the first time to all the Queen's subjects, but the Legislature, when making such concession, directed that the right should be exercised in a particular manner. The Legislature said to the person about to make a conditional purchase :—"You may within certain limits take any Crown lands, even though under lease for pastoral purposes (as provided by section 13 of the Crown Lands Alienation Act of 1861), but in doing so you must obey certain directions." While the extraordinary power was given to any one, of his own mere will, to take possession of 320 acres of Crown lands held by another person under a valid and binding lease from the Crown, and by such taking possession *pro tanto* to cancel such lease, this power was ordered to be exercised so far as the lengths and directions of the boundary lines were concerned

in a mode clearly and distinctly laid down. It seems to me to be beyond all doubt that this privilege can be exercised in no other way than that which has been prescribed by the authority which created it. It is no common law privilege. It is, on the contrary, a thing altogether alien to the common law. It is the creation of a statute, and its extent and the mode of exercising it depend altogether upon the terms of that statute, and not upon any man's discretion. The Legislature has not given to any one the power to say that a conditional purchaser may ignore any of the provisions of the Act. The only authority in this way is that given to the "Minister" to "modify," as already mentioned, and that power was not exercised in this case. To hold that a conditional purchaser can, in the absence of such modification, select his land, where it has no frontage, otherwise than as a square, or otherwise than with boundaries directed to the cardinal points of the compass, is to act in direct violation of the law. In this case the Court has no power to declare what it may conceive to be right or convenient. Its duty is to see that the directions of the statute are obeyed, and to leave to the Legislature the task of removing the restrictions which it has imposed, if those restrictions should be thought to be unwise. For these reasons I am of opinion that my direction to the jury was correct, and that the verdict, which was in opposition to it, was erroneous.

I am further of opinion that the verdict was clearly against the evidence. For the reasons which I am about to give in my judgment in the case of *Annie Joachim* v. *O'Shanassy*, I thought at the trial, and I still think, that a conditional purchaser who does not, within a month from the time of making his written application to the land agent, occupy the land so applied for, *ipso facto* avoids or vacates his purchase. It was, therefore, material for the plaintiff to prove at the trial that before the expiration of the 20th March, 1873, he occupied the land in question in this case.

William Joachim, the elder, was the first witness called on behalf of the plaintiff. He stated that on the 19th March, about five o'clock in the evening, he went on the land in question with the plaintiff, then eight years of age, his wife and seven other children, and two men. "We pitched three tents," he said, "at the corner of William, George, Henry, and James's selections." According to the description given to the land agent, the south-west corner of James's selection was thirteen chains fifty links to the east of the point where the north-east corner of George's selection coincided with the south-east corner of William's and the north-west corner of Henry's; so that it would be impossible to place the three tents at the corner of these four

selections, although they might be placed near the corners of *three* of them—namely, George's, Henry's, and William's. One of the tents he described as William's tent, and, with reference to that tent, he said, "I built William's house *about two chains from where William's tent was*"—that is to say, from where William slept on the night of the 19th March. After this evidence was given, Filgate, one of the two men who accompanied William Joachim, sen., and his family to the land on the 19th March, was examined, and he said, "We pitched a tent that night on William Joachim's selection. I know where the house now is in which William Joachim the younger—the plaintiff—lives. *The tent was about thirty yards south-west of where the house now is.*" Thus William Joachim, sen., and Filgate fix the position of the tent—the one at two chains (that is to say, forty-four yards) from the hut afterwards built for William, and the other at about thirty yards south-west of that hut. Mr. Finlay, a Government surveyor, was next examined, and he described the relative positions of the various lines according to the descriptions in the original applications to the land agent. He saw the hut or house already spoken of, and he stated its position to be "*about three chains* (that is, sixty-six yards) *to the west*" of the east boundary line of the plaintiff's land, supposing that line to be drawn according to the application, and parallel to the line of railway. Of course, if that line were run due north from the north-east corner of George's selection, the hut would be still further from the line. After the surveyor had given this evidence, William Joachim, sen., was recalled by plaintiff's counsel, and said, referring to the plan produced by Mr. Finlay, "The hut is put down here correctly—very nearly; where I placed the three tents on the night of the 19th March *was over three chains* to the west of where the hut is now." Having, in the first instance, stated this distance to be about *two chains*, after he had heard the surveyor speak of the distance of the hut from the dotted line as about three chains, he then says the distance was *over* three chains, and in cross-examination he said that it was from three to four chains. His son, John Thomas Joachim, was called immediately after this evidence was given, and he said, "On the night of the 19th we stopped at Willy's ground; I know where Willy's hut is now; we camped on the 19th, about eighty yards (3 chains and 14 yards) from where that hut is; I know where the railway reserve is; the hut is nearer by eighty yards to the railway line than the place where we slept that night." The next witness called was James Skelly, who, as well as Filgate, was with the Joachims on the night of the 19th March. He said, "I know the land, the subject matter of this

action. There was a tent on it when I first knew it. There is a hut on it now. I slept for ten or twelve nights at the tent. From tent to hut might be from two *to* four *chains*. I know the railway reserve. The hut is nearer than the tent to that reserve." This is the whole of the evidence adduced on the part of the plaintiff to prove that within the month he occupied the land in question. Assuming that a "north-easterly" line is the same as a line parallel to the railway, and a line such as the Act would authorise, then it appears to me that this evidence manifestly does not warrant the finding of the jury, that the plaintiff, before the expiration of the 20th March, occupied to the westward of that line. Still less does it support the finding that the plaintiff's tent was placed to the westward of a line running due north from his commencing point. I am, therefore, of opinion that, on the 1st, 2nd, 4th, and the 5th grounds, the rule for a new trial ought to be made absolute.

HARGRAVE, J. This action was tried before his Honor the *Chief Justice*, in May, 1875. The jury returned a verdict for the plaintiff, with damages £50. On the 14th June following, a rule *nisi* was granted by the Full Court for a new trial, or to enter a verdict for the defendant upon the following grounds, viz. :—

1. Upon the ground reserved by the Judge,—"That the alleged conditional purchase of the plaintiff is invalid for non-compliance with the Crown Lands Alienation Act of 1861, for that the eastern boundary line (not being a 'frontage') was described in the application as 'a line running north-easterly.'" 2. Upon the ground also reserved by the Judge,—"That the said conditional purchase was invalid for non-compliance with the said Act, for that the application did not describe the land applied for (being land without 'a frontage') as a square with the boundaries directed to the four 'cardinal points of the compass.'"

Besides these two points reserved by the Judge at the trial, the present rule was granted upon the three additional grounds, viz. :—"3. That the alleged conditional purchase was invalid, inasmuch as the description in the written application is unintelligible and void for uncertainty. 4. That the verdict was against the evidence. 5. That the verdict was contrary to law and to the direction of his Honor."

Although, when the rule was granted, I thought there was no ground for disturbing the verdict upon any of the grounds taken in the rule, it is, perhaps, desirable that these points of law should now be fully considered, and decided authoritatively, so as to prevent any future litigation against the validity of the usual forms and particulars of applications for free selections under the 13th section of the Crown Lands Alienation Act of 1861; and,

consequently, affecting the titles of all grantees under such applications, or their alienees, ever since the passing of that Act.

The 1st, 2nd, and 3rd grounds of this rule relate to the form of the plaintiff's written application, which was in the following terms, from the form given in the schedule to the Act:—"I am desirous of purchasing without competition under the 13th section of the Crown Lands Alienation Act . . . county of Cadell, parish of Moama, 320 acres, commencing at the north-east corner of the block applied for by George Joachim, thence north-easterly along the reserve for railway line 60 chains, thence west about 60 chains 50 links, thence south about 50 chains, and thence east along the northern boundary of the block applied for by . . . about 47 chains to the commencing point."

Against the validity of that application, which was strictly within the limitations contained in the 13th section of the Act, it was gravely contended that because the subsequent 17th section required the Government surveyor, if he surveyed the land before selection, to measure off such land into blocks, with their "frontages to any river, creek, road, or intended road, or to the cardinal points by compass"—subject also to the Minister's power to modify such boundaries—therefore the written application by the selector himself, before survey, under the 13th section, which expressly permits the application to be "for any Crown lands not less than 40 acres, nor more than 320 acres," shall be incorporated with the 17th section. And all these applications under the 13th section, though before survey, must be, in fact, surveyed, and in accordance with the detailed directions of the 17th section.

As a preliminary remark, I may state that everyone who recollects the public and Parliamentary considerations of the Crown Lands Alienation Acts, will remember that one of the most essential and valuable features of the *free selection system* was that "selection was to precede survey," the land was to be selected without waiting for any surveyor; precisely as all the pastoral runs are taken up, and have always been taken up both under the old Orders in Council, and under the Crown Lands Occupation Act of 1861.

I am not disposed, however, to say anything further about the general policy of the Act as applicable to the question before the Court; but will rest this judgment altogether on the strictest interpretation of the 13th section according to the long established rules for construing statutes.

Let us first look at the present description of the plaintiff's selection, as if no provision had been made by the Legislature for Government survey, or any other survey under the 17th section.

The first point appearing upon the plaintiff's application and description is that it is perfectly specific *as to a known point of commencement*—"the north-east angle of George Joachim's block." The application then goes on to describe three of the boundary lines, or west, south, and east, but describes the fourth boundary line as north-easterly along the reserve for railway line. It is said this fourth boundary line should have been "north," and the reserve should be disregarded, although that reserve had, in fact, a north-easterly direction. Two obvious consequences would follow from this construction, viz.:—First, either the results of this would have been to invalidate the whole application as including "*a portion of a reserve*," which was of course the real object of the argument. Second, if the application had excluded the triangular portion between the railway reserve and the due north line, that triangle would have been excluded altogether from being selected, because it would be triangular, and not a four-sided piece of land.

I will now refer to the well known judgment of the late Chief Justice, Sir *Alfred Stephen*, in *Emery* v. *Barclay* (*b*), which expressly lays down this broad general rule, which I have never heard questioned by anyone till now:—"The written application is the *guide*, although it may be looked to in connection with the actual occupation to explain what is meant by it." Any definite fixed description is enough "written in the application" to "guide" all adjoining selectors and the Government surveyor when he comes to survey the selection. In the same judgment, at page 375, it appears that it was the Government surveyor, Houghton, who had adjusted the shape of the selection, and of the adjoining selections, which were approved by the Minister at page 378. Sir *Alfred Stephen* says:—"The grant certainly cannot be impeached by shewing defects or even falsehood in the declaration." Sir *Alfred Stephen* then laid down the seven following rules:—

"Firstly, the land purchased by the conditional purchaser is the land *indicated* by the written description contained in the application accepted by the land agent. Secondly, the 'temporary' boundaries taken up on the land are *not* ultimately binding on either the Crown or conditional purchaser; but *modifying the boundaries* does not entitle the Government, without the selector's consent, entirely to *change the site*. To *modify* or adjust can only mean to vary the boundaries in some small degree, not to place it altogether somewhere else. Thirdly, that as the land necessarily means the land applied for, not the land supposed or intended by

(*b*) 8 S. C. R. 381.

the conditional purchaser so to be, the Government clearly can and ought to place the selection *substantially according to the description;* 'modified,' if necessary, according to circumstances. Fourthly, that it is not for a Government surveyor, of his own authority alone, and without confirmation by the Government, to place a free selector on the ground or to modify the boundaries. That the modification or adjustment must, according to the statute, be by the Minister, and, until he has approved of or adopted the survey in any given case, it will go for nothing. Fifthly, that this approval is in the nature of a judicial act, and, therefore, a *modification*, once so confirmed or approved of, cannot be reviewed. In other words, one modification by the Minister is all that the statute contemplates. Sixthly, that every free selection must, in shape and direction of boundaries, be what the statute prescribes, and, if not, it will not be within the protection of the statute. But, if it be made correct by approved adjustment, the law will then cover and protect the selection. Seventhly, that if, on the one hand, a grant cannot be impeached by shewing that the Minister ought not to have been satisfied on the question of occupation and improvement, so, on the other hand, his not being satisfied on these points, and, therefore, refusing to authorise the issue of the grant, *will not defeat* the conditional purchaser's Parliamentry title by due selection and purchase in the mode prescribed, followed by occupation and improvement if all these points be established to the satisfaction of a jury."

These carefully elaborated rules, or, rather, considerations, from which neither I nor Mr. Justice *Faucett* dissented, though, as worded, we cannot be held to acquiesce in their exact expression, seem to me to have placed the title of all free selectors upon the proper and legal basis under all the four stages of complete selection. These four stages are under separate sections of the Act. First, selections by written applications under the 13th section; second, temporary boundaries under the 16th section; third, measuring merely with frontages or to the cardinal points under the 17th section; and fourth, occupation, residence, and improvements to the satisfaction of the Minister under the 18th section.

Moreover, it is obvious that all these four stages in perfecting the free selections of the whole colony are, in their very nature, and from the essential circumstances of the case, perfectly separate and distinct from, and, indeed, inapplicable to, each other. Thus the boundaries and measurements prescribed by the 16th and 17th sections, which are now by the defendant contended should be superadded to selections under the 13th section, are altogether quite inapplicable to selectors under that section.

W. JOACHIM *v.* O'SHANASSY. (*a*)

Trespass—Crown Lands Act—Description of Conditional Purchase in Application—Boundaries.

The plaintiff's application for a conditional purchase described one of the boundaries as a line running north-easterly. On the trial of an action brought against the defendant, the lessee of a run, for trespass to the plaintiff's conditional purchase, the *Chief Justice* directed the jury that, inasmuch as there was no "frontage" to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore void; and directed a verdict for the defendant. The jury found a verdict for the plaintiff.

Held (per HARGRAVE and SIR W. MANNING, JJ.; *dissentiente*, SIR JAMES MARTIN, C.J.) that the direction was wrong, and that the verdict was not against the evidence.

Trespass. In this action a rule *nisi* was obtained in June, 1875. The judgments of the Court on the motion for a rule *nisi* in this action, and also in *Annie Joachim* v. *O'Shanassy*, are reported in the Appendix, *post*. *Butler*, Q.C., and *Healy*, for the defendant, supported the rule in June, 1876, and *M. H. Stephen* shewed cause for the plaintiff. The Court reserved judgment.

SIR JAMES MARTIN, C.J. This was an action of trespass to land brought by the plaintiff—an infant—by his next friend, William Joachim, his father. The land in question had formed portion of the defendant's squatting run. On the 19th February, 1873, William Joachim the elder, professing to act as the plaintiff's agent, delivered to the Crown lands agent at Moama, in accordance with the terms of the 13th section of the "Crown Lands Alienation Act of 1861," a written application for the conditional purchase of 320 acres of land, which he described as follows:—

"County of Cadell, parish of Moama, 320 acres, commencing at the north-east angle of the block applied for by George Joachim, *thence north-easterly along the reserve for railway line* 60 chains, thence west about 60 chains 50 links, thence south about 57 chains, and thence east along the northern boundary of the block applied for about 47 chains to the commencing point."

On the same day on which William Joachim the elder delivered this written application to the Crown lands agent, he delivered in several more in the names of other children of his, and, amongst them, two in the names of his sons, Henry Bristow, and George. The south-eastern corner of Henry Bristow's selection was the

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starting point, by reference to which the commencing points of all the others were to be ascertained, and on which their position depended. The description of that lot was as follows:—

"County of Cadell, parish of Moira, or unnamed, 320 acres, commencing at a point opposite, and west of the south-west angle of allotment 58, parish of Moira, and only divided therefrom by the reserve for railway line; thence north-easterly along the reserve for said railway line 60 chains, thence west about 60 chains 50 links, thence south about 57 chains, and thence east about 47 chains to the point of commencement."

The south-west angle of allotment 58, mentioned in this description, was a fixed and easily ascertained point; and the reserve for the railway line was also fixed. It followed, therefore, that the north-western corner, as well as the western boundary line of the land applied for in the name of Henry Bristow Joachim, could be easily ascertained. The description of the land applied for in the name of George Joachim was in these terms:—

"County of Cadell, parish of Moama, 320 acres, commencing at the south-west angle of block applied for by Henry Bristow Joachim, thence north about 57 chains, thence west about 56 chains, thence south about 57 chains, and thence east about 57 chains to the point of commencement."

Comparing these two descriptions of George and Henry Bristow, it would seem that the eastern boundary of the former and the western boundary of the latter are one and the same line, and that the north-eastern corner of George's land is the north-western corner of Henry Bristow's. Henry Bristow's north-eastern corner is, as we have seen, 60 chains 50 links to the westward of the railway reserve. It follows, therefore, that this is the distance of George Joachim's north-eastern angle from that reserve. This angle being the commencing point of William Joachim—the plaintiff's description—it is apparent that the first line which he describes as starting from that point, namely, the line "north-easterly *along* the reserve for railway line 60 chains," is an impossible line, because the commencement of it is 60 chains 50 links to the westward of that line, and it therefore cannot be drawn *along* it. I pointed out this evident mistake in the description to the jury, and told them that they might regard that eastern boundary of the plaintiff's selection as a line running north-easterly, and reject that portion of the description which referred to the railway line. No question turns upon that direction now. I, however, further told the jury that inasmuch as there was no "frontage" to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore

a question of fact was against the evidence; and also upon certain points of law, which from their wide-spread importance have required the fullest consideration.

My opinion, after close attention to all matters discussed before us, is that the plaintiff's verdict ought not to be disturbed.

I. The special finding of the jury had relation to a contest at the trial, whether the plaintiff had, in accordance with the "Crown Lands Alienation Act of 1861," occupied, within one month after conditional purchase, a certain selection of 320 acres made for him by his father on 20th February, 1873, and for trespassing on which by the defendant this action was brought. It had been contended for the defendant, with the approval of the presiding Judge, that unless the plaintiff had occupied his selection by way of "residence" within its limits and within the month, his action must fail. Accordingly, the plaintiff sought to prove his residence by the occupation of a tent on the night of 19th March, at a spot in the neighbourhood of, and as alleged, just within the south-east corner; and the defendant on the other hand asserted the spot to be to the east of the proper corner pin, and therefore outside the selection. The question thus arising was complicated by a sub-enquiry whether the plaintiff's eastern boundary was to be treated, for the purpose in hand, as a line running north-easterly from his starting point, as claimed in his original description, or as a line adjusted to the north cardinal point in accordance with the requirements of section 17 of the Act. Much evidence was given on both sides as to the position of the corner-pin, and of the tent respectively. In summing up to the jury, the learned *Chief Justice* very carefully reviewed the evidence, and he asked the jury to state specially, whether they thought that the plaintiff's residence, on the 19th of March, was to the west of, that is to say, within his eastern boundary, or to the east of it. In returning their verdict for the plaintiff, the jury specially said: "We find that the plaintiff was, on the 19th of March, on the ground to the west of the true eastern boundary (red line in plan) according to the application, and also to the west of a line drawn north from starting point in that description." It is this finding which is impugned, and the question now is (according to our established rule) whether we can declare it to be "manifestly wrong." For my own part, I have little hesitation in stating an impression that the preponderating weight of evidence was against the finding, but, nevertheless, I cannot say that the jury were "manifestly wrong." There certainly was some evidence, which, if it were credited, supported the verdict; and the credit

of a witness falls especially within the province of the jury to decide on. I am the more indisposed to question the finding, because it was arrived at after the full review of the evidence of which I have spoken, and in deliberate reply to a question put to the jury apart from all other matters; and because the terms of the finding itself indicate a clear comprehension of the questions for decision. I may further say that the very narrow and strict character of the point submitted for the decision of the jury would otherwise have disinclined me to interfere; it was no more than whether a spot of ground on which the plaintiff went to reside in obedience to the law, and which was *bonâ fide* supposed to be on his selection, was precisely within his boundary, as subsequently ascertained, or a few chains outside of it; and moreover, this narrow question had reference to the subject of occupation exactly within one month after purchase—a question which I regard as *strictissimi juris*, and which, according to the argument, involves a no less extreme penalty than the loss of the plaintiff's purchase. I may add the common grounds of expense, delay, and harassment to the parties, and the special ground that in this case the question was of a character to strain the conscience of witnesses to the utmost; and might become even more so if a re-trial were granted upon this particular pinch of the case; and especially if the faint traces of residence which a tent would leave should now have become obliterated. On these grounds, I think it far better that a first deliberate decision by a jury upon the matter should be regarded as final and conclusive.

II. The question of law first raised at the trial and before us related to the *description* of the plaintiff's selection in his original application for purchase. There was no question as to the regularity of the application in other respects; or as to the payment of the deposit of 5s.; or as to the plaintiff's having been duly declared by the land agent to be the conditional purchaser as provided by section 13 of the Act. Nor could there have been any difficulty in identifying the land as described, inasmuch as the starting point was clear, and the lines from and to it were unmistakable. But the objection was that the boundaries claimed were—in the particulars which will presently appear—out of conformity with the requirements of section 17.

The question is one which, according to my experience of the common imperfectness of descriptions by free selectors, has application to a great multitude of cases; and as it amounts to a questioning of the selectors' titles in all such cases, I shall not hesitate to go fully into my reasons for deciding against the objection. It is true that the recent enactment in section 14 of the

Amending Act of 1876 has given to the Minister power under which any error may be conclusively rectified, but it is not to be supposed that those powers will have been exercised in all the cases that might come under question if the point taken in this case were not sustained.

The description was as follows :—

"County of Cadell, parish of Moama, 320 acres, commencing at the north-east angle of the block applied for by George Joachim ; *thence north-easterly along the reserve for railway line* 60 *chains*, thence west about 60 chains 50 links, thence south about 57 chains, and thence east along the northern boundary applied by [*sic*, but necessarily meaning 'applied for by'] George Joachim, about 47 chains to the commencing point."

The description was a mistaken one in respect of its eastern boundary, it being made manifest by the starting point, and the southern and other boundaries to the westward and northward of it, that the selection was not on the railway line, but was a back block "without frontage," and to the westward of a selection on that line which had previously been made for one of the plaintiff's brothers. The other selection had rightly given a north-east direction to its eastern boundary, because such was the course of the railway line which constituted a "frontage;" and, in consequence of the diagonal direction thus caused, the length of this line was 60 chains instead of about 57 chains, which would have been its length in a due north direction; and its northern and southern boundaries (being themselves to their cardinal points) were necessarily of the unequal lengths also stated in the plaintiff's description, so as to meet the termini of the frontage. Obviously, the brother's description had inadvertently been copied into that of the plaintiff, so far as concerned its eastern boundary and its consequent lengths of lines on that side of the block; but otherwise there could be no doubt as to the position of the block described for the plaintiff or as to so much of it (being the great bulk of the block) as was not affected by the error. The *Chief Justice* ruled at the trial (in which ruling I concur) that the error was self-corrected as to the railway line being a boundary; and he therefore allowed the words "along the reserve for railway line" to be rejected; but he considered that the residue of the error (however obviously associated with the rejected part) could not be so disposed of; and that the description must therefore be read as giving a line "north-easterly 60 chains," and with the north and south boundaries of the unequal lengths therein stated. The effect undoubtedly was, that the description was *partially* out of conformity with the measurements prescribed by section 17,—which says, in respect of blocks without "frontage," that they

"shall be measured in square blocks, with the boundaries directed to the cardinal points." And his Honor considered that the plaintiff's application was thereby wholly vitiated; and that he had consequently no right of action against the defendant. He, however, reserved the question for further consideration here; and it has now been argued before us as a ground for setting aside the verdict which the plaintiff obtained in opposition to the ruling.

In discussing the matter, it will first be important to say exactly how far the description is in due conformity with, and how far out of conformity with, the required measurements; and with this view it will be convenient to state that the ordinary official measurement of square blocks of 320 acres gives to each line a length of 56 chains and 57 links—for which the words "about 57 chains" in this description may be regarded as an equivalent. Now, here it will be seen that the northern, southern, and western lines are all directed to their cardinal points, and, therefore, adapted to the formation of a square with such direction of boundaries; and that the western boundary is of the right length for a square containing 320 acres—that is to say, "about 57 chains." From which last fact, it follows as a mathematical sequence that the eastern boundary must, by reason of its uniting the same parallel east and west lines, be of the same length from due north to due south. Consequently, the objection is confined to the divergence of the eastern boundary line to the east of due north, and to the effect of that divergence upon its own length, and upon the lengths of the north and south boundaries to reach its termini.

And next, it is essential to the right appreciation of the proposition before us that we should see clearly to what it amounts when extended to its full proportions. The contention was that the acquisition of land by way of conditional purchase from the Crown is by statute only; and that where (as is usually the case) it is in derogation of the previously vested rights of a pastoral lessee, the Act must be construed strictly against the purchaser; and, consequently, that, although nothing is said as to boundaries in the purchase clause, section 13, yet, that the requirements of section 17 must be annexed to its provisions by implication, and must be peremptorily followed; and any departure from those requirements, although partial, must, it was said, render any application for, and declaration of, purchase, under section 13, absolutely and wholly void *ab initio*, so as to be incapable of being set up by any subsequent matter, or by any authority whatever. Accordingly, it was denied that the selector himself could correct his error by adjusting his actual occupation to regulation boundaries, or by the marking, under section 16, of "temporary

boundaries," in accordance with the regulations, or by the survey of a licensed surveyor, at his instance, in default of a Government survey within a year, as also authorised by that section; and it was in like manner denied that the Government could, by any official survey, adjustment, or modification, or concession, cure or waive the defect, or remove its alleged fatal consequences. Hence, it was further said that, as the foundation of title was absolutely void, the selector would remain without title of any kind, even after full performance of the conditions for improvement and residence under section 18. And doubts were very consistently suggested whether the alleged void inception of title would not even vitiate a grant issued upon payment of the balance of purchase money, on the ground that grants can only be issued in accordance with the Act, and that a grant to one who had not become a purchaser in strict accordance with that Act would be *ultra vires*. And, lastly, it must be observed that the right of contesting a conditional purchaser's title on this ground was claimed, not to the Crown only, but to any person having an interest in disputing it.

These extreme views appear to me opposed to the spirit of the Act, and not justified by any sound interpretation of its language.

As regards the principles on which the Act ought to be interpreted, my opinion is that, instead of construing it rigidly against the conditional purchaser, the Court is bound to follow the policy of this Act and the contemporaneous Crown Lands Occupation Act, which most manifestly is to encourage and facilitate the settlement of the country by means and for the benefit, incidentally, of resident and improving purchasers, and to subordinate thereto the tenure of the Crown's pastoral lessees. This is a broad State policy, by which the Legislature designed to promote the general well-being and advancement of the country in directions of national importance; and under its guidance I think it our judicial duty to give effect to the beneficial purposes of the Act to the fullest extent which its language will fairly permit. And, as concerns the particular subject of *descriptions* in original applications, I think we might reasonably lean (if it were necessary) to the supposition that, as the Legislature plainly intended to work out its policy by a class of persons who would generally be unlearned men, and very frequently out of the reach of help in framing their applications, it neither expected a perfect understanding of the Act in the way of implication from clause to clause, nor intended to require such exactness in descriptions as would stand the test of rigid and adverse legal criticism. And I further think we may gather that Parliament did not mean to bar all possibility of remedy in respect of the errors into which

they might fall, or to withhold all authority for that purpose from the Crown and its ministers. If indeed the Legislature had contemplated such rigidity, it would, I think, have expressed its requirements in plain and unmistakable words, and would have been equally clear in indicating the penalties for non-compliance.

Yet here we are asked to adopt a rigid construction; and accordingly the foundation of the argument is, not that the section in the Crown Lands Alienation Act to which selectors are directed for their applications contains any express provisions as to the statement of boundaries, or any cautionary reference to such provisions elsewhere, but that the requirements of section 17 must be annexed by judicial implication to those of section 13. And as regards the penalty for non-compliance, the argument appears to me to rest wholly upon implications of an even more remote and unsatisfactory character; all of which is opposed to the spirit in which I feel bound to read the Act.

Apart, however, from such special considerations as I have hitherto mentioned, I cannot accept this proposed association of the 13th and 17th sections, in the sense of creating a peremptory obligation to observe the regulations of the latter in the original applications, on pain of total invalidity.

Section 13 simply authorises the purchase of "any unoccupied Crown land" other than town and suburban lands, &c., and not being less than 40 acres, nor more than 320; and makes no reference to section 17; whilst the latter section is palpably addressed to the subject of official surveys, and the final settlement of boundaries by the authority of the Government, at a time necessarily subsequent to the purchase; and is correspondingly free from any express reference to clause 13.

That the character of section 17 is such as I have stated is manifested by the immediately preceding section, in which a survey by a licensed surveyor is authorised, "in case the land shall not be surveyed by the Government within twelve months from the date of application;" and by the terms of section 17 itself, and especially by the words and the subject matters of the proviso therein.

It is true that section 17 commences by saying that lands which have been "measured by the authority of the Government *previously* to the conditional purchase" shall be "taken" in portions as measured; and so far it may very reasonably be read as referring to the original *taking* under section 13, not only because of the words used, but because the land having already been measured and charted, may readily be described by its ascertained boundaries or by simple reference to the charted number of the block. But as regards lands not previously measured, it enacts

that frontage lands "shall have" their boundaries to the frontage with their other boundaries directed to the cardinal points; and in respect of lands without frontage, such as that now in question, the language is that they "*shall be measured*" in the form already stated. And then comes the proviso, which puts it beyond question that the Legislature was thinking only of measurements and final settlements of boundaries by the authority of the Government, seeing that it provides that "*modifications of boundaries may be made by the Minister for Lands, and necessary roadways and water reserves excluded from such measurement.*"

This being the obvious primary object of section 17 as regards unmeasured blocks, I think it would be a very violent implication to hold the applicant bound exactly to observe its provisions without hope or possibility of correction in case of error. I cannot suppose that Parliament so intended. On the contrary, the introduction of these regulations into a clause somewhat remote from section 13 (and separated from it by clauses for clearly progressive matters after purchase and before survey), and providing for final action by the Government in a way of measurement and reservations, &c., appears to me to indicate an intention to impose the duty of bringing selections into conformity with the regulations upon the Government rather than on the unlearned selector; and at the same time I think that these provisions, together with that as to modifications of boundaries, import that the Government was to have some power to correct the blunders which might occur in selectors' claims, and not to be a mere instrument for measuring on the ground what the selector might have rightly described on paper.

It may be true that selectors were expected to observe these provisions to the best of their power; and there can be no doubt that any prudent man, who knew what to do, would very carefully describe his boundaries at the outset according to the form which they must (in the absence of special grounds for modification) be ultimately made to assume. And it may be that a total disregard of the regulations for measurement might justify the entire rejection of the application by the Crown (which would thereupon, however, return the deposit, and thereby put the selector into a position for immediate re-purchase); or it might, perhaps, even vitiate the purchase altogether in relation to the prior pastoral lessee. But I am of opinion that in a case of such *partial* non-conformity as in the present case, there is no ground for deeming the application wholly and irremediably void, either as against the Crown or the pastoral lessee. As to part of the land applied for, I hold that the plaintiff's right must be recognised by both, and by this Court; and as the defendant's trespasses extended

over the whole area applied for, this is enough for present purposes. The part I here allude to is so much of the land as would be within a true square, with boundaries to the cardinal points from the starting point, and along the southern boundary as described. This would give, approximately, some 225 acres wholly within the 320 acres as applied for and trespassed over.

But, further than this, I am not prepared to deny the right of the Crown, in the absence of conflicting purchases, to correct the plaintiff's blunder, and to give him, if it should see fit, the whole quantity applied for. On the contrary, I incline very strongly to the opinion that it possesses the necessary authority. Not only do the provisions of section 17 appear to me to indicate, as already said, an implied grant to the Government of powers for adjustment and correction, but I think that we may derive some aid towards adopting this implication from the following matters, that is to say, from the general policy of the Act, and especially from the reference to the Minister's "being satisfied" as to the performance of the conditions of section 18; from the position of the Crown and Government, relatively, to the Crown lands and to the selector, as importing authority; from the relation of vendor and vendee, which, more or less, implies some power for mutual concession and adjustment; from the fact that the Crown has accepted the application and deposit, and declared the purchase in accordance with the statute; and from that regard which the tenderness of the law demands, to the alleged alternative of a total loss by the conditional purchaser of the homestead he was encouraged to acquire, and of the money, time, and labour bestowed on his purchase, and in performing the statutory conditions.

And if I be right in assigning to the Government any powers whereby the original defect becomes *susceptible of correction*, it follows (independently of what I have said as to the plaintiff's right to a reduced square) that such an application as the plaintiff's cannot be regarded as wholly void *ab initio*.

On these grounds, I hold that the objection now under consideration does not bar the plaintiff's right of action in this case.

III. The remaining questions had reference to the obligation of a conditional purchaser, under section 16 of the "Alienation Act," to "*occupy*" his land within one month of the date of purchase; and to the effect of failure therein as affecting the respective legal positions of the plaintiff as purchaser and the defendant as prior pastoral lessee;—the contention being that such occupation must be by way of residence, and that any failure to occupy to the day or within the precise boundaries would absolutely and irremediably vitiate the purchase, and be fatal to this action.

These points were of course independent of the previous questions as to the description in the plaintiff's application, and were therefore subject to the assumption that the plaintiff's purchase was perfectly regular and complete in its inception under section 13. My opinion is against the defendant's contention; but as I uphold the jury's finding that there had been occupation in accordance with the ruling, it is not necessary to enter more fully upon the subject in this place. In another case (*A. Joachim* v. *O'Shanassy*) which also stands over for judgment, my reasons for the above opinion will be required, and will be fully stated.

Upon the whole of this case it appears to me that the plaintiff acquired a title to the land by his purchase; and that according to the jury's finding of residence he sufficiently entered into occupation and possession to enable him to maintain this action; and that the rule for a new trial ought therefore to be discharged with costs.

Rule discharged with costs.

Attorneys for the plaintiff— *McCarthy and Robertson.*

Attorneys for the defendant—*Ellis and Makinson.*

ANNIE JOACHIM *v.* O'SHANASSY. (*a*)

Trespass—Crown Lands Acts—Conditional Purchase—Necessity for Occupation within a Month—Entry before Trespass.

Plaintiff, a conditional purchaser, sued defendant, a squatter, for trespass. At the trial the *Chief Justice* told the jury that the substantial question for them was, whether the plaintiff occupied within a month from the date of her application. If she did, she was entitled to recover; if not, the verdict ought to be for the defendant. *Held* (per HARGRAVE and SIR W. MANNING, JJ.; *dissentiente*, SIR JAMES MARTIN, C.J.), that such direction was wrong.

Per SIR W. MANNING, J.: The plaintiff must shew actual possession of the *locus in quo* before the acts of trespass complained of.

Per HARGRAVE, J.: The *onus* of proving the breach of any of the conditions is on the trespasser, and the lessee is in no different position from a stranger.

The rule for a new trial in this case was argued in June, 1876, by *M. H. Stephen*, for the plaintiff, and *Butler*, Q.C., and *Healy*, for the defendant. The Court reserved judgment, which was delivered as follows :—

SIR JAMES MARTIN, C.J. This was an action brought by the plaintiff, an infant, by her next friend, William Joachim, her father, against the defendant, for trespasses committed by

(*a*) March 20.

depasturing sheep upon her land. This land had formed portion of a large squatting run held by the defendant under lease from the Crown. On the 19th February, 1873, William Joachim, professing to act as the agent of his daughter, the plaintiff, lodged in the Crown Lands Office at Moama, in pursuance of the terms of the 13th section of the Crown Lands Alienation Act of 1861, an application for the conditional purchase by her of 320 acres, described as follows:—"County of Cadell, parish of Moama, 320 acres. Commencing at the north-east angle of the block applied for by James Joachim; thence north-easterly along the reserve for railway line 60 chains; thence west about 60 chains 50 links; thence south about 57 chains, and thence east along northern boundary of block applied for by about 47 chains to point of commencement." Several witnesses were called on behalf of the plaintiff to prove occupation by her within one month after the date of the conditional purchase, as required by the 16th section of the Act. I told the jury that the substantial question for them was, "Did the plaintiff occupy within the month—that is to say, before the expiration of the 20th March, 1873?" If she did, I said she was entitled to recover; if not, the verdict should be for the defendant. The jury on this direction found a verdict for the defendant, and a rule was subsequently granted calling on the defendant to shew cause why such verdict should not be set aside and a new trial granted, on the ground that I erroneously held that the plaintiff, in order to succeed in this action, was bound to prove that she occupied the land within a month from the date of the conditional purchase thereof, and that is the question now to be determined.

I am of opinion that my direction to the jury was a correct one. The alienation of "Crown lands" in this colony, such as the lands in question in this case, is regulated entirely by statute. In 1873, when the plaintiff made her conditional purchase, the Act regulating such alienation was the 25 Victoria, No. 1, which Act has lately been amended by the 39 Victoria, No. 13. This latter statute has no bearing upon the present question. In the early days of the colony, and for a long time afterwards, the Crown, as the owner by the common law of all the unalienated lands, made grants *ex mero motu* in such forms and under such conditions as were thought expedient by its advisers or representatives, to encourage the settlement and cultivation of the country. At a later period Acts were passed to put an end to grants of this description, and to provide for the disposal of the Crown lands by the sale of them by auction. This mode of disposing of them in fee simple remained in operation for several years, until in 1861 the Crown Lands Alienation Act of that year

was passed. By that Act the Crown, equally with its subjects, is bound. The one can grant, and the other can acquire, the fee simple in Crown lands only in the mode prescribed by that enactment. An owner of land in fee simple may, as everybody knows, convey it, with or without consideration, to whomsoever he may please; and anyone may purchase, either in his own name or in the names of his or any other infant children, any lands that the owner in fee is willing to sell to him. Thus, a person desiring to advance his children, may purchase land in their names, and have such land conveyed to them at once, even though they may be under the age of 21 years, as they can take the land under such a conveyance, although they cannot convey it away during their minority. A purchase of this kind may be made not only from private individuals, but it may be made at auction from the Crown also. There is nothing to prevent a person attending a sale of Crown lands and purchasing in the name of infants any lands then offered that he may desire and be able to pay for. But the conditional purchase—popularly termed "free selection" under the Crown Lands Alienation Act, 25 Vic., No. 1—is a different thing altogether. The mode of alienating public lands came into operation then for the first time. It was, after much difficulty and many acrimonious and exciting discussions, both in and out of Parliament, adopted by the Legislature to promote the more rapid and beneficial settlement of the country, by enabling poor people, or people with limited means, to select small portions of Crown lands of their own motion, on their paying a small sum per acre down, and doing certain things which the statute prescribed. For instance, power was not given to any one to conditionally purchase his 40 or 320 acres of land by paying a deposit of 5s. per acre, and then leaving it unoccupied or unimproved as long as he might think fit. A scheme of that sort would obviously have placed the whole country in the hands of speculating capitalists, and would not have accomplished what the Legislature intended. Accordingly, it was provided that before the expiration of a month from the original purchase or selection, the person so purchasing or selecting was to occupy the land, to improve it, and to reside upon it for a certain time. These were the conditions on which this great privilege of "free selection" was conceded to him, and on which the Crown was authorised to grant him the land. The Crown could not demand from him the performance of other conditions, neither could it dispense with any of the conditions so laid down by the statute. It has, by a very rigid application of the principle that a Court is in general bound by its previous decisions, been held by this Court, that an infant a moment old

might, under the Act of 1861, by a self-constituted agent select land and occupy it within a month, improve it, and in three years make a declaration that all these things had been done. In reality, there was only one Judge of this Court who entertained this view; and yet, curiously enough, that view came to be binding on the Court. The result was thus brought about:— In *Emery* v. *Barclay* (*b*), the Court are reported to have been "agreed in opinion that a selection might be made by a person under twenty-one years of age, and by a father in the name of his son." That agreement was arrived at apparently without argument of any kind. The infant in that case was a grown-up lad of sixteen years or more, and habitually an actual worker on the ground. In *Drinkwater* v. *Arthur* (*c*), decided in 1871, two years after the former case, a question arose as to the validity of a "free selection" by a father in the name of his infant child three and a half years old. His Honor Mr. Justice *Hargrave* (p. 219) likened the case to that to which I have above referred, of a father purchasing in the ordinary way, in the name of his infant children, between which and such a case as that under consideration there is, as it appears to me, no point of similarity whatever, and held that the age of the infant made no difference in the power of the father to select in such infant's name. It is plain that in the case of an ordinary purchase by the father in the child's name, it is the father who acts on his own account, and, as a principal having full power, independently of any statute, to do as he likes with such land as he may buy, while, in the case of a "free selector," it is the "infant" who selects, and has to comply with the statutory condition to enable him to acquire any land at all. His Honor the Chief Justice, Sir *Alfred Stephen*, while he saw no reason to dissent from the view which he took in *Emery* v. *Barclay*, said (p. 205) that a selection by a baby or by a father already a free selector on his own account, in the name of that baby, appeared to him to be worse than merely a farce, that it was a fraud upon the statute. Mr. Justice *Cheeke* (p. 228) referred to the decision in *Emery* v. *Barclay*, and said *were it not for that decision*, he had no hesitation in saying that *he should certainly concur in the judgment of his Honor the Chief Justice.* Thus, in a Court consisting of three Judges, because two years before, without argument, the Court said that a grown-up lad, 16 years of age, might "free select," Mr. Justice *Cheeke* concurred with Mr. Justice *Hargrave* in holding that an infant of any age might so select, although he agreed with the *Chief Justice* in the opinion that such an interpretation of the law was an erroneous one. Thus the matter stood until the case of *John*

(*b*) 8 S.C.R. 380. (*c*) 10 S.C.R. 103.

Thomas Joachim v. *O'Shanassy* (*d*), decided by Mr. Justice *Hargrave*, Mr. Justice *Cheeke*, and Mr. Justice *Faucett* in 1874. In this case, Mr. Justice *Cheeke* again expressed his concurrence with the views of Sir *Alfred Stephen*, but held himself bound by the decision in *Emery* v. *Barclay*, while Mr. Justice *Faucett*, without giving any opinion of his own, held himself bound by the decision in *Drinkwater* v. *Arthur*, but not by *Emery* v. *Barclay*, which he regarded as no authority on the point in question. Thus the right of a father to select in the name of an infant of any age was again upheld, although again one of the three Judges who so held thought that view to be wrong, and another gave no opinion of his own, so that, of the four Judges, Sir *Alfred Stephen*, Mr. Justice *Hargrave*, Mr. Justice *Cheeke*, and Mr. Justice *Faucett*, who were concerned in deciding these three cases, one, and one only, expressed the opinion that an infant, from the moment of its birth, was capable of making a conditional purchase under the Crown Lands Alienation Act of 1861. This last case was taken to the Privy Council, and that tribunal (*e*) agreed with Mr. Justice *Hargrave*, and it must now be assumed in this Court that his Honor was right in this matter; although, if I may venture to say so with the greatest respect, that judgment, as a matter of reasoning, apart from authority, would have been more satisfactory if it had not been based so pointedly on a "course" or "series of decisions acted upon for several years," seeing that there had only been three such decisions—the first in 1869, when the point was agreed upon without argument; the second in 1871, when this agreement was erroneously acquiesced in as a binding authority by Mr. Justice *Cheeke*, who, while so acquiescing, thought it to be wrong; and the third in 1874, when a majority of the Judges were influenced only by the authority of the two previous cases, which one of them thought to be wrong, while the other offered no opinion. These three cases (the last being the one then under appeal) can hardly be called with propriety a "course" or "series" of decisions, or be said to be decisions "acted upon for several years." Satisfaction with this judgment would further not have been diminished if their Lordships had recognised the fact that a conditional purchaser takes his land, not by means of a grant from the Crown, which the Crown may in its discretion refuse, but by his own unfettered act, by virtue of a statute which *entitles* him absolutely to a grant if certain conditions are observed by him. I may further remark that it is obvious that the surmise that many titles may have depended upon the assumption of the power of an infant to "free select" was of no importance, inasmuch as a late Act, of which their lordships

(*d*) 13 S.C.R. 174. (*e*) L.R. 1 App. Cas. 82.

were aware, confirmed all such titles, and rendered any straining of the law unnecessary to uphold them.

The judgment of the Privy Council leaves the present question untouched, and there is no decision of this Court upon it, although it would seem from expressions used on some occasions that it has been assumed that to make a conditional purchase valid there must be occupation within the month. The Act under which these "free selections" are made is very badly drawn, and in some instances things, instead of being required in so many words to be done, are made necessary only by an implication arising from expressions in which the doing of them is assumed to be required. In construing this, like all other Acts, it is the duty of the Court to ascertain as well as it can the meaning and intention of the Legislature, in order that that intention may be carried out. A careful examination of the Act must, I think, lead to the conclusion that one of the conditions imposed upon a "free selector" is that he should occupy his selection within a month. The 13th section authorises any person on any land office day to tender a written application for the conditional purchase of land as therein mentioned. *This* section contains no direction in reference to the occupation, but in the 16th section it is enacted that if at the time of the conditional purchase the land "shall not have been surveyed by the Government, temporary boundaries thereof shall be determined by the conditional purchaser who shall within one month after such time of purchase occupy the land." There may be some difficulty in saying what a "temporary boundary" is, and what is meant by this power to "determine" such a boundary. Probably, looking at the presumed inability of the majority of persons likely to become conditional purchasers, it was thought that, however able they might be to give a description of the lengths of the lines, which they intended to form the sides of their selections, they would not be able with precision to lay down those lines upon the ground, and that, therefore, they ought to be allowed to mark such lines provisionally, subject to correction when the surveyor came to ascertain and fix them. But, however that may be, the direction of the statute is plain that the conditional purchaser is to occupy the land within a month. If he does not do that, it seems to me that he does not comply with one of the essential conditions, on which the right to select was conceded to him. It is true that the 13th section states that if, when he makes his selection by the written application to the land office, and pays his deposit, "no other like application and deposit for the same land be tendered at the same time, such person shall be declared the conditional purchaser." By these words, it has been contended

that his purchase becomes complete before the month—that is to say, at the moment of selection, and that subsequent non-compliance with the condition as to residence renders the selection liable to forfeiture only at the instance of the Government. But it will be observed that he is to be declared at the time of his selection, not the "purchaser," but the "conditional purchaser," that is to say, a purchaser provided certain conditions are complied with. By one part of the Act he is entitled, without any person's leave, to take land by expressing in writing to a particular officer an intention so to take it, but by another part of the Act he is told that if he does this, he must go into occupation within a month. He is a purchaser only *conditionally* until that is done, and after that is done he is still a purchaser only conditionally until a certain time expires, and certain things are proved to have been done by him. These other things are set forth, not in direct terms, but by implication, in the 18th section of the Act. At the expiration of three years he must pay the balance of his purchase money, and tender a declaration to the effect *(inter alia)* that the land has from the date of occupation been his *bonâ fide* residence, and the clause concludes thus:—"But, in default of a compliance with the requirements of this section, the land shall revert to Her Majesty, and be liable to be sold at auction, and the deposit shall be forfeited." It will be observed that the requirements, non-compliance with which authorises the Crown to declare a forfeiture, are the requirements of the 18th section. Among those requirements, that of occupation by the conditional purchaser within a month from the time of his selection, is not included. This section, therefore, does not regulate the forfeiture for the breach of *that* condition, and, unless it be held that the selection is *ipso facto* void on non-compliance with such condition within the month, there is nothing to prevent the selector making his selection and postponing his going into possession as long as he pleases. This never can have been intended by the Legislature, and is quite inconsistent with the express direction in the 16th section, that occupation must begin within the month. If it does not so begin, one of the most essential conditions of the purchase is violated, and the application and deposit go for nothing. To hold otherwise would be equivalent to a repeal of that part of the 16th section which requires this occupation to be had within the month. I am therefore of opinion that my direction to the jury was correct, and that this rule should be discharged.

HARGRAVE, J. In this case a verdict has been returned for the defendant, but after a direction by his Honor that the plaintiff before she "could succeed in this action was bound to prove that she occupied the land within a month from the date of the conditional purchase thereof."

The consideration of this direction also involves the larger and more important questions, whether all free selectors are in all future trespass actions bound to prove all the other statutory requirements after a valid selection accepted by the Crown, and are to be open to actions of ejectment by the lessees of the run out of which the selection has been made; and are, in all such actions, whether trespass or ejectment, *bound to prove*, among other things, the primary fact that they "occupied" the land selected within one month from the date of the application.

When the rule was before the Court, it was also pointed out that although the present point only refers to the initiative "occupation" by the selector within one month, under the 13th section, the decision of this Court would not only probably extend to all the other statutory conditions which the selector has to perform during the first three years, such as residence and improvements, and also to all the subsequent payments of interest and instalments of rent—which, if this direction be sound in law, the lessee could compel the selector to establish by direct testimony, and that the same direction would equally extend to all grantees or alienees from or under all the selection titles in the colony, whether questioned in trespass by the selector, or in ejectment by the squatter.

There is another point of law equally important which is closely involved with the present subject, viz., whether the free selectors of the colony, and those claiming under them, in lawful possession of their lands, can be thus challenged in litigation by the lessees without any interference from the Crown authorities. These most important questions do not appear to have been yet decided to their full extent, except by implication.

I will first refer to the well-known leading case of *Mate* v. *Nugent* (*f*), which has always been considered and acted upon throughout the colony as having fixed the legal position of the selector as conditional purchaser under the 13th section, whereby he receives a "Parliamentary title" by the words of that section, to an estate and interest in the specific portions of land selected, capable of passing by heirship and alienation under the Act, but always being subject to the statutory conditions, as well as being liable to forfeiture and reversion to the Crown under the 18th section, in default of the fulfilment of the conditions of the Act.

The selector's title thus obtained on the original application, and "declared" to him by the 13th section as the "conditional purchaser," has also by sub-section 12 of section 12 of the Crown Lands Occupation Act, the further statutory operation

(*f*) 8 S. C. R. 146.

and legislative effect of "cancelling" the lessee's interest *quoad* the specific portion of land selected. This "cancelling" of the lessee's interest, and the Parliamentary title acquired by the 13th section, are both clearly established law in our colony, and must not now be reversed or interfered with, either directly or indirectly; considered together they constitute the only protection to all selectors, and persons claiming under them against universal and perpetual litigation.

Now that the present direction compels this Court authoritatively to fix the relative positions of squatter and selector when before a jury, either in trespass or ejectment, it seems to me that the case of *Mate* v. *Nugent* and the absolute "*cancellation*" of the squatter's lease by the lawful written application under the 13th section accepted by the Crown, shew clearly that, at least until a declared forfeiture by the Crown, the selector is *not bound* to prove more than the written application and its acceptance, and that it is for the defendant to shew, if he can, either an actual forfeiture or such a "default" or conditions broken as will defeat the original application.

In the second place this view of the law seems to me most strongly supported by the very carefully considered words of the late Chief Justice (Sir *Alfred Stephen*): "This Court has held in the three cases of *Mate* v. *Nugent* (*g*) (1869), *Chisholm* v. *Macaulay* (*h*) (1860), and *Emery* v. *Barclay* (*i*) (1869), that performance of the conditions—proved to the satisfaction of a jury in an action of trespass or otherwise—will enable a purchaser to retain the selected land, even against a subsequently issued Crown grant. It appears to me equally to follow that where it is in like manner shewn that the selector has violated those conditions or any of them, *the Crown is entitled to take advantage of the breach*, and the statutory title will then fall. Now, that is exactly what has occurred here. The *declaration of forfeiture*, if not supported by facts proved, I repeat, to the satisfaction of a jury, would avail nothing, for, as we have held, the title cannot be taken away by the erroneous decision or act of any Crown officer whatever. The declaration of *forfeiture*, therefore, is *in any case only so far of value that it notifies the election* (or is itself the *election*) *of the Government* to take advantage of the breach committed, I say—supposed to have been committed; because after all has been shewn, the fact of forfeiture must eventually be established, if disputed in a Court of law. For the purpose of indicating that election, however, the *Gazette* notification is all important. Without it *no land agent* would be authorised to receive applications for the forfeited land; nor

(*g*) 8 S.C.R. 246. (*h*) 7 S.C.R. (*i*) 8 S.C.R. 380.

could any third person be assured that the *Crown would enforce the forfeiture.*" These most careful expressions, by Sir *Alfred Stephen*, plainly indicate that the late *Chief Justice* thought that the Crown alone "was entitled to take advantage of the breach of conditions," and that until forfeiture, or at least proved forfeiture, no *third person* could take advantage of any breach of conditions—"the Crown must enforce the forfeiture."

Now, although it may be strict Crown law that, if a suit of intrusion be taken out as against a free-selector (or ejectment brought as in Queensland) by the Crown officers, the selector may thereupon be put to the establishment of his title affirmatively, I have yet to learn that the selector is bound to prove, even as against the Crown, anything beyond the written application under the 13th section and its lawful acceptance by the Crown. Why should the selector or grantee have also the *onus probandi* of establishing that all the subsequent payments of interest and instalments, and every other statutory detail, have been complied with, even to the payment of the £1 per acre for the ultimate grant of the fee simple; and that the grant itself shall be invalid against the Crown, and the Crown could oust the selector if he fails in any one of such details? In my opinion, the *onus probandi* of a breach of any of these details of condition would be upon the Crown, as against the accepted application by the Crown lands agent; and, consequently, the *onus* would, at least equally, lie upon the lessee, if taken to be in the place of the Crown.

Thirdly. These first and second reasons for my present judgment are also confirmed and strengthened by the natural justice of the case and the common law as to Crown lands.

It is clear, from all previous decisions upon the Land Acts, that this Court, in all of its decisions, equally in favour of lessees or of selectors, has always most scrupulously kept in view the elementary law that the Crown, as Crown landlord, is the root of all subsequent rights, interest, and titles, whether in lessees or selectors; and also in all sub-grantees of the fee simple, under either one or other class of initiative titles.

The well-known cases of *The Attorney-General* v. *Brown*, decided in this Court in 1846 and 1847, *The Queen* v. *Symonds*, before the New Zealand Court, and every other Crown lands case in these colonies and before the Privy Council, down to the very recent case from Victoria, where their lordships have confirmed Mr. Justice *Molesworth's* decision as to gold mines remaining in the Crown, and upon the universal application of the common law right of the Crown as against all subjects, unless by direct grant in express terms, have placed the present point beyond all controversy, in my mind, antecedently to the Amendment Act of

1875. And, in my opinion, the lessee of a run is, by the 12th section of the Crown Lands Occupation Act, completely denuded of his estate and interest in the land selected upon the very day that the selection is lawfully applied for under the 13th section; and if the selection be forfeited subsequently, this must, by common law, ensue only to the benefit of the Crown as universal Crown landlord, and the lessee must acquire from the Crown some new title to the land in question before he can trespass on the land while occupied by the selector under his original application, or set up any further right by ejectment, at least so long as the selector has not been interfered with by the Crown.

Fourthly, another very leading guide to the decisions of this Court upon these Acts is that we consider it to be our duty carefully to guard the real property of the colony, and never needlessly to imperil or disturb the titles of free selectors or squatters throughout the colony; and not by encouraging astute and refined construction of words or phrases of these most important statutes, which we most certainly would be doing if we were to lay down this broad rule that the selector or grantee is bound affirmatively to prove all the details of the free selection, though long after all possible evidence may have been lost.

This principle was clearly before the Privy Council in the first of the *Joachim* v. *O'Shanassy cases*, and also before the late *Chief Justice* in this Court in *Drinkwater* v. *Arthur*. And it needs no argument to shew that unless we strictly adhere to this principle, this Court would soon cease to administer law and equity with advantage to the community, and would become a great public mischief, for no man's title would be safe against oppressive litigation. Fifthly, and lastly, Mr. *Stephen* very forcibly argued, What can be a greater grievance than to allow a lessee to come in at any time, no matter how long after selection, and compel the selector, or his subsequent alienee or grantee, to prove by affirmative evidence that his first selector, many years ago, "occupied" the land within the first month after the date of the application? and this, too, after long acquiescence by the Crown as Crown landlord to both parties, when the selection has been improved by large expenditures, and the Crown has also all along received the annual interest or deferred payments and all subsequent instalments, or even issued the grant itself to the selector.

It seems to me, however, that upon the strictest construction of the 12th section of the Crown Lands Occupation Act, the declaration that the "*selection*" or "*application*" shall "*cancel*" so much of the lease as is included in the application, requires this Court now to maintain that the lessee is a *mere stranger*; and that all

the titles of the colony are not henceforth to be at the mercy of *mere strangers* as trespassers, and for all time to come. It seems to me that this can only be done, with justice to both parties, by throwing the *onus probandi* upon the lessee, and not upon the selector.

This judgment would scarcely be complete unless I referred to the 19th section of the Crown Lands Alienation Act Amendment Act of 1875, though inapplicable to the present case. That section enacts that "Any land which shall have reverted to Her Majesty, or shall have become forfeited under the Crown Lands Alienation Act of 1861, or this Act, shall thereupon, if the same be within an area under lease, or promise of lease, return (together with any land held under pre-emptive lease in connection with such first mentioned land) to the person entitled to such area by virtue of such lease or promise of lease at the time of such reverting or forfeiture, subject, nevertheless, to sale as by the said Act provided."

It is observable that the Legislature is here very careful to use only words of future operation, as "shall have reverted," "shall return," &c.

The new enactment has only once come under our consideration as yet, viz., in the case of *Dines* v. *Gordon*, as to the retrospective operation of the 14th section, under which the Minister for Lands had issued to the defendant (but after the action had commenced; in fact, the day before the trial) a certificate of description, which Mr. Justice *Faucett* refused to admit in evidence, in which refusal the *Chief Justice* and myself concurred, as not admissible as between the parties to that action. In delivering judgment the *Chief Justice* took a wider view than Mr. Justice *Faucett* or myself thought necessary for the decision of the mere point of admissibility of the certificate, and citing many important decisions of the English Courts as to the construction of statutes, such as *Fowler* v. *Chatterton* (*j*), *Moon* v. *Darden* (*k*), *Pettambendass* v. *Thackcoorselass* (*l*), and Lord *Coke's* maxim, *Nova constitutio futuris formam imponere debet, non præteritis*. And under the authority of this construction of the 14th section, and especially of the authorities cited by the *Chief Justice*, applied to the 19th section of the same Act, it is perfectly clear, to my mind, that the 19th section can have no retrospective effect upon the present case. I am not, however, disposed to push the authority of *Dines* v. *Gordon*, as a decision, to its full extent, because the 14th section only was before the Court; but it is of great importance as shewing that the 19th, and all other sections of this new enactment, must not be

(*j*) 6 Bing. 250. (*k*) 2 Ex. 22. (*l*) 7 Moo. P.C., 239.

extended beyond selections subsequent to the date of the Act. And it would be against natural justice that selections before that date should be drawn within its terms.

As regards the convenience, or rather public policy in the present matter, I apprehend that there cannot be a moment's doubt that it is the Crown alone, that is, the Governor and Executive Council in each case, on public grounds alone, under the suggestion of a "responsible Minister," that can so modify and enforce the *bonâ fide* performance of all the statutory conditions taken together, both as to time, place, and degree as against each selector as a Crown tenant according to the real equitable intention of the Crown and selector; and I cannot be party to any decision which would thus cancel and destroy vast areas of the real property titles of the colony, under the Crown Lands Occupation Act as well as the Alienation Act, in respect of such *wretched objections*, as that the tent of the plaintiff was, through a mistake, a few feet outside the exact boundaries, as originally described in the application; or that her sleeping on the land did not take place till a few moments after noon on the last day of the month subsequent to the application. In my opinion, assuming the plaintiff's original application to be legally valid *per se*, there was not the slightest *onus probandi* on her, as the plaintiff in an action of trespass, to prove anything further than the accepted application in strictness of law, and that the *onus* lay upon the defendant to prove non-occupation by the plaintiff, or breach of any other condition. As some discussion took place at the argument as to the legal meaning of the word "occupy," I must state that, in my opinion, the English authorities upon all cases of "occupation" of various kinds, as for obtaining votes, rates, &c., all shew that the legal meaning of the word is exactly in accordance with its derivation, viz., from "*ob*" and "*capio*," that is, "to take for a purpose;" such purpose must vary according to all the infinite variety of "taking" land.

In the present case, I think that the occupation was quite complete in law when the plaintiff took the land for the purposes of the Act, when paying her deposit under the 13th section to the Crown lands agent, and his acceptance thereof, if she went on to the land itself, even for a single hour, under the authority of the application accepted, and for the purpose of the Crown Lands Alienation Act as entitled on the accepted application, and sleeping or other evidence is not required by law.

What is the "residence" required for three years after "occupation" within the first month is a totally different question, which does not arise upon the present rule.

Although all the selectors who have hitherto entered into evidence or litigation in this country have hitherto, *ex abundanti cautelâ*, gone on to prove "occupation" and fulfilment of the conditions, that practice cannot help us on the present rule, because it has been granted expressly for this Court to decide what is to be the future practice according to strict law and the existing authorities; and our present decision must fix for all future time that selectors, and those claiming under them, must go beyond their written applications, and establish by evidence some "*occupation*." That the mere production of the valid application, and payment of deposit accepted by the land agent, is not sufficient *primâ facie* evidence of title in a selector to maintain trespass.

As I think that the non-occupation within the month, or the breaches of any of the conditions, was more properly to have been required from the defendant, as against the plaintiff's legal title, after long reflection upon the authorities from *Mate* v. *Nugent* to the present date, and upon the general justice of this case, I regret that I cannot concur with the direction of the *Chief Justice* to the jury that the plaintiff's application, as accepted by the Crown, was insufficient for a *primâ facie* title. For these reasons I think there should be a new trial, as the direction as to the *onus probandi* must have prejudiced the plaintiff upon the evidence.

Sir WILLIAM MANNING, J. As in *William Joachim's case*, this action was for trespasses by the defendant on land claimed by the plaintiff as her conditional purchase under the Crown Lands Alienation Act of 1861, and which had previously been in the defendant's occupation as part of his leased run under the Occupation Act of the same year. The same questions arose as in *W. Joachim's case*, except that this plaintiff's *description* of her land was not made the subject of any objection; and, as in that case, the learned *Chief Justice* ruled in favour of the defendant, that the plaintiff was bound to occupy her land by way of residence within a month after purchase, and that failure in that respect *annulled the purchase* and *defeated the plaintiff's right of action* against this defendant. On the question of fact whether the plaintiff had so occupied, his Honor left the issue very distinctly to the jury, and gave them the advantage of a careful examination of the evidence. The jury, however, came to a contrary conclusion from that arrived at in *William Joachim's case*; and being of opinion that the plaintiff had not been in residence within the month, they gave the defendant a general verdict.

In the following term we were asked for a rule to shew cause why the verdict should not be set aside and a new trial granted on various grounds; and a rule was granted on the single question of misdirection as to occupation. Upon shewing cause, the defendant's counsel, however, not only argued in favour of the ruling, but also fell back upon an independent point, to the effect that the verdict was right on the ground that *possession* was necessary at common law for the maintenance of an action of trespass, and that the plaintiff had wholly failed to shew possession in any way prior to the alleged acts of trespass.

I. Upon the question as to occupation under section 16, the defendant contended that as between parties in the relative positions of the plaintiff and himself, the obligation to occupy within the month was imperative; and that such occupation must be by way of residence, and must also be precisely within the month and within the boundaries as described in the application and identified on the ground. Failing such occupation, he contended to the effect that the purchase must fall to the ground so absolutely and irremediably as to leave the prior pastoral lessee in the same position as if no purchase whatever had been made. Either the purchase was supposed to be inchoate only until occupation had taken place, and to become a nullity on failure to reside within the month; or in some other way such failure was to have a retroactive effect so as to extinguish the purchase *ab initio*.

The contention comes to this, that upon a purchase duly made and declared, and deposit paid and accepted under section 13 of the Act, the purchaser is not only to be subject to the expressed conditions set forth in section 18 and to forfeiture to the Crown as therein provided in the event of non-performance of those conditions to the satisfaction of the Minister for Lands, but is also to be subject, under some legal implication, to a total lapse of his purchase into the hands of the prior pastoral lessee, in case he shall fail to commence residence (although perhaps otherwise in occupation) until a day after the month—or in case a residence commenced within the time and *bona fide* intended to be on the land should prove to have been, at however trifling a distance, outside the boundaries as ultimately ascertained. And it went to this extent that by reason of the supposed void foundation of title, the purchase could not in such events be set up by any concession, waiver, or act of the Crown, nor by the purchaser's subsequent performance of the conditions named in section 18. And, as in *William Joachim's case*, the contention would seem necessarily to involve the invalidity of a grant subsequently issued to the selector upon full payment of his balance, on the

ground that the issue of such grant would be without any legal foundation of purchase.

Reverting to the view expressed by me in that case as to the policy of the Land Acts (as being based on broad State views for the general benefit of the country rather than upon any desire to give special privileges to individuals which incidentally arise out of that policy) and the principles for their interpretation, I do not hesitate to reject the defendant's proposition.

The curious parenthetic form in which the only direction to "occupy" appears, amongst other matters, in section 16, and the comparative unimportance of the matter enjoined, would alone indicate the improbability of the Legislature's having intended to assign to a failure in compliance with this requirement the fatal effect claimed for it. But it is still more to the point to note the absence from this clause of any expressed condition of forfeiture, and to mark its contrast in this respect with section 18. As a rule, no forfeiture or lapse will arise out of a breach of obligation unless it be distinctly declared; and this rule may be regarded as absolute where a forfeiture is expressly imposed in respect of one matter, and omitted as to another. In fact, we must, in such a case, assume that the Legislature as deliberately omitted the penalty in the one instance as it expressed it in the other. Yet, in the face of these considerations, the argument here is that the Court ought to annex by implication a penalty as serious, and, as I think, even worse, for the most literal and unintentional breach of section 16, as the statute has imposed by express words for enforcing the far more substantial requirements of section 18 in case of the Minister's dissatisfaction.

We need not, however, confine ourselves exclusively to these considerations. We must also go back to section 13, under which the plaintiff was, after due application and payment, declared the conditional purchaser; and then look to the enactment in section 12 (par. 12) of the "Crown Lands Occupation Act of 1861," where it is enacted that "the sale, conditional or otherwise, of any portion of land under lease shall cancel so much of the lease as relates to the land so sold." From these enactments, in conjunction, I deduce that the sale to the plaintiff (being in all respects originally regular) was complete as a "conditional sale" on its declaration as such, and that the defendant's pastoral lease was thereupon *pro tanto* cancelled; and I think that whatever consequences might or might not follow, in relation to the Crown, from any failure by the plaintiff to conform to the provision in section 16—for an act of subsequent performance—such failure cannot give to this defendant a right to question the purchase.

The direction to occupy within the month, followed as it is by the condition of section 18, for residence during the residue of three years from the date of occupation, is of itself a matter of obviously little moment, except as fixing *a date from which the condition of residence is to start.* In that connection it is important, and I could understand a question whether the failure to occupy within the month might not be regarded in strictness as involving a breach of the condition of section 18. But then the result would be a forfeiture or reverter to the Crown in case the Minister should not be satisfied, and not a reinstatement of the pastoral lessee. Or perhaps it might be contended that such failure constituted an *abandonment;* but that would imply the existence of a previously acquired estate under the purchase and a concurrent cancellation of the defendant's lease *pro tanto.* In either of these cases the purchaser would be in the hands of the Crown, which might not think it necessary, in the interests of the public, rigorously to assert the letter of its rights, if satisfied that the requirements of the law and the policy of the Act had been substantially observed and carried out.

It must, however, be remembered that I am speaking of matters arising under the Act of 1861, and not under the amending Act of 1875, which introduces, in section 19, the principle of a return of forfeited lands, or lands which may have reverted to the Crown under the Act of 1861, to the pastoral lessee. When any question shall arise under that enactment, it will become necessary to consider how far the previous action of the Crown may be necessary for the establishment of the forfeiture or reverter under which the pastoral lessee will become re-entitled.

II. On the question whether actual residence, as distinguished from other modes of occupation, is essential under section 16, I expressed during the argument an impression in the negative, and that impression is, on further consideration, confirmed. It is certain that the words of that section do not of themselves restrict the selector to that form of occupation; for the words "shall occupy" may unquestionably be satisfied in a variety of ways without residence. But it was said that, inasmuch as the occupation is to be followed up under section 18 by residence from its date, it must be inferred that like residence was contemplated by section 16 also. I cannot assent to this in the aspect in which the proposition is presented. The Legislature has thought fit to use in the two clauses words which have not the same ordinary signification; and in the latter clause it has even put the words "occupation" and "residence" into immediate juxta-position and contrast. Hence it appears to me that according to one of the commonest rules for the interpretation of

statutes, we are bound to assume that the Legislature intentionally used a diversity of language in order to express the diversity of meaning which the language primarily conveys. It may indeed appear at first sight somewhat trifling to press a distinction between these words; inasmuch as the occupation under section 16 may be limited to one day only, and the long residence under section 18 must immediately follow. And, indeed, the distinction would be of no practical importance if this occupation were to be regarded merely as *the starting point of the condition of residence* under the latter section, and as being involved in the same consequences of forfeiture to the Crown, and to the Crown only. But the argument of counsel, and the view taken by the learned Judge at the trial, as to the distinctive results of a failure to comply with sections 16 and 18 respectively, were such as to make it necessary to read the words of each clause strictly according to their own proper significations. If non-occupation within the month is to cause an absolute and irremediable lapse in favour of a hostile claimant, and non-residence (to the satisfaction of the Minister) during the residue of three years, is to create a forfeiture to the Crown, which may not be harshly asserted, there are both legal and practical reasons for not confounding our interpretations of the enactments.

III. Under the view I have thus expressed, as to the ruling at the trial, it would have been incumbent on me to give my voice in favour of a new trial, were I not satisfied that the defendant's cross argument is right upon the common law point. There can be no doubt as to the necessity for legal "*possession*" in order to maintain trespass, and I think it clear also that in this case there was no evidence of possession by the plaintiff before the date of the acts of trespass complained of. I have indeed felt some difficulty as to whether it would not, nevertheless, be our duty to send the case for a new trial, lest this absence of evidence might have been occasioned by the direction to consider residence only. Certainly the jury's finding of non-residence on the land within the month might be consistent with the fact of possession having been obtained in other ways and at some other time before the trespasses. But the plaintiff appears to have so completely exhausted all the evidence she had to give, as to leave no room for surmising that possession may have been taken in any other way, or at any other time, than as actually shewn in the attempt to establish residence. There is, therefore, no ground for thinking either that the jury might have come to a different conclusion if their attention had been directed to the issue of "possession" before trespass; or that the plaintiff could have then advanced or could now produce any other evidence to prove such possession.

Nor are the general features of this case such as to favour the granting of a new trial. The plaintiff was a mere instrument in the hands of her father, who was attempting, by the use of her name and the names of seven others of his children, to secure a large area of land within the defendant's run, and who, in carrying out that attempt, sought to comply with the letter of the law by a minimum of occupation. The father put his children in divisions to sleep in huts or tents erected at their supposed mutual corner pins; and in attempting this narrow compliance, it might be expected that some of the children would turn out to be in wrong places, as found by the jury to have been the case with this plaintiff: and I think further that this economy of occupation in the form selected for this purpose, renders it probable that nothing further was done which could be fairly construed into possession within the boundaries.

To the considerations now stated for refusing a new trial, I may add the concluding reasons which I gave for not disturbing the verdict in the case of *William Joachim* v. *O'Shanassy*; and this further one of the same character—namely, that I think it would, under the circumstances, be dangerous and unfair to the defendant to send the case back for re-trial upon the question of possession, because it is a point which would give opportunities for such evidence of acts of possession as the defendant might have no opportunity of controverting if untrue. I am compelled to say that there were features in the plaintiff's evidence which prevent me from feeling entire confidence in the witnesses.

Rule discharged with costs.

Attorneys for the plaintiff—*McCarthy and Robertson.*

Attorneys for the defendant—*Ellis and Makinson.*

APPENDIX.

ILLIDGE & ANOTHER *v.* LEARY & ANOTHER. (*a*)

Ejectment—Statute of Limitations—Evidence of Possession.

This was an action of ejectment tried before *Faucett*, J., at the sittings in February, 1875, and brought to recover possession of 1500 acres of land known as Campbell's grant, or Campbell's Point, near Lake Macquarie. It was bounded on one side by a creek, and on the other three sides by straight lines, measuring respectively a mile and a-half, a mile, and two miles in length. There was no evidence that the land was fenced in; indeed, it appeared that it was unenclosed forest land. The legal title of the plaintiffs was made out beyond all question, and the defendants had no title except by possession. The principal evidence of possession was that of a person named Sidebotham, who was there some twenty-four years ago. He at first lived on the opposite side of the creek, and afterwards shifted across the creek and ran his cattle over the land in question and other places in the neighbourhood. According to his evidence his cattle grazed over the whole of the land. But he could not describe the boundaries with the exception of the creek, nor could he give any description of the other "points" which he occupied. The witness admitted in cross-examination that he had taken up plenty of nice little corners which did not belong to him, and that whenever he found a likely-looking piece of land unoccupied he would turn his cows into it.

Faucett, J., in summing up, told the jury that a taking up of land to constitute such possession as would exclude the real owner from his rights, must be not merely allowing cattle to stray over it, but taking it up with the intention of holding it, using it as the occupier's own, and keeping possession of it. The jury by a majority returned a verdict for the plaintiffs.

Butler, Q.C. (*Windeyer* with him), now moved for a rule *nisi* for a new trial, on the grounds that the verdict was against evidence, that fresh evidence had been discovered since the trial, and that the Judge misdirected the jury. FAUCETT, J., as to the last ground, said that he had not given the direction complained of, and the ground was abandoned.

(*a*) March 15, 1875.

PER CURIAM (Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.). It is true that any possession upon which an action of trespass may be maintained is sufficient possession to give a title under the Statute of Limitations. But the possession must be co-extensive with the property claimed, and here there is no evidence what was the extent of the occupation. In squatting actions for trespass the possession of a tract of country is shewn by evidence either of a line having been surveyed, or trees having been marked, or of cattle having grazed up to certain well-known boundaries or natural features of the country. And the grazing must be a grazing with the owner's intention, and not a mere trespassing by the cattle. A man cannot go on land with 40 or 50 head of cattle, put up a hut, and then say that he had possession of all the land over which his cattle may indefinitely graze. There must be evidence of the user of the land, with the intention of using and occupying it. Here there was no evidence of the number of cattle that Sidebotham had, and he could give no description of the land he had taken up. Would that evidence be sufficient in an action for trespass to a run? The Court is asked to grant a new trial on the ground that the verdict was against evidence. But it is difficult to come to the conclusion that the jury were not perfectly justified in finding the verdict they did on the mere evidence of Sidebotham that he was there, without shewing how far his cattle grazed. Another ground taken is that it appears from affidavit that fresh evidence had been discovered since the trial. But the rule is that the Court will only grant a new trial on such a ground if the new evidence be such as to satisfy the Court that the jury would be bound upon it to find a different verdict. It does not appear from the evidence set out in the affidavits that if it were before the jury they would be likely to take a different view. It is no more definite than Sidebotham's evidence at the trial.

Rule refused.

Attorney for defendants—*R. W. Thompson.*

THROSBY AND OTHERS *v.* KEIGHRAN. (*a*)

Mortgagee and Mortgagor—Right to sue on the Covenant after exercising Power of Sale—Equitable plea.

To a declaration upon the covenant to pay contained in a mortgage deed the defendant pleaded on equitable grounds that the mortgagee before action brought had sold certain portions of the mortgaged lands, received the purchase money, and executed the conveyances. A replication setting out the mortgage deed, which contained a power of sale—*held*, on demurrer, a good replication.

Declaration. 1st count: Breach of covenant by the defendant to pay the plaintiffs £1200 and interest.

Plea on equitable grounds. That the covenant in the said first count mentioned was contained in a deed of mortgage, being the deed in the said first count mentioned, by which certain lands therein particularly described were granted, released, and conveyed to the plaintiffs by the defendant by way of mortgage for the purpose of securing to the plaintiffs the repayment by the defendant of the said sum of £1200 and interest thereon, as therein mentioned, and that after the execution of the said deed and before the commencement of this suit the plaintiffs entered into the possession of the said lands so mortgaged to them as aforesaid, and afterwards and before the commencement of this suit the plaintiffs, without the knowledge or consent of the defendant, sold certain portions of the said land to certain persons purchasers thereof from the plaintiffs and received the purchase money therefor and executed conveyances thereof to the said purchasers, who thereupon entered into and at the commencement of this suit were and still are in the possession of the said land. And by means of the premises the defendant has been greatly prejudiced and damnified and has been and is wholly discharged from all liability to pay the amount due on the said covenant.

Replication that the mortgage deed in the plea mentioned was in the words and figures following, &c. The power of sale was in the following words—"That it shall be lawful for the said mortgagees &c. without any further consent of the mortgagors to enter into the possession of the said hereditaments hereby assured or intended so to be and whether in or out of possession to make any lease or leases thereof for any term not exceeding 7 years as they he or she may think reasonable and proper. And also to sell and absolutely dispose of the said hereditaments or

(*a*) September 8, 1873.

any part thereof in whatever manner and subject to whatever conditions the said mortgagees &c. shall deem expedient with liberty to buy in the same at any auction or auctions and to rescind any contract or agreement for letting or sale and afterwards to let again or re-sell the said hereditaments and generally to exercise all the powers of an absolute owner or owners thereof in the disposal or conveyance thereof it being hereby expressly declared that contracts leases conveyances and all other acts deeds and assurances made executed or done by them him or her in this behalf shall be valid and effectual to all intents and purposes although the mortgagors or their respective heirs shall not concur therein or shall dissent therefrom." Averment that the acts in the said plea complained of were done under and in pursuance of and in accordance with the said powers and provisions in the said deed contained, and that all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiffs so to do and to sue upon the said covenant in the said plea mentioned.

Demurrer upon the ground:—"That the mortgagees having sold and conveyed away the land mentioned in the said plea and under the circumstances therein set forth and admitted by the said replication and being therefore unable to restore the same to the mortgagor on payment of principal and interest the mortgagor is discharged from his covenant, and this notwithstanding the power of sale contained in the said mortgage as set out in the said replication."

Joinder in demurrer.

Martin, Q.C. (*M. H. Stephen* with him), for the defendant, cited *Perry* v. *Barker* (*b*), *Lockhart* v. *Hardy* (*c*), *Palmer* v. *Hendrie* (*d*), *Rudge* v. *Ritchens* (*e*), *Jones* v. *Walker* (*f*).

Manning, Q.C. (*Salomons* with him), for the plaintiffs, was not called upon.

PER CURIAM (*f*). We entertain no doubt in this case. There is a great difference between a sale and foreclosure under a decree and a sale under a power contained in the mortgage deed. In the latter case the act is done with the mortgagor's consent. We think that a mortgagee can sell under a power of sale and sue on the covenant afterwards.

Judgment for the plaintiffs.

Attorney for the plaintiffs—*Billyard.*

Attorneys for the defendant—*Pigott and Trickett.*

(*b*) 8 Ves. 527; 13 Ves. 119. (*c*) 9 Beav. 349. (*d*) 27 Beav. 349. (*e*) 42 L.J.C.P. 127. (*f*) 6 S.C.R. Eq. 3. (*f*) Sir A. STEPHEN, C.J., HARGRAVE and FAUCETT, JJ.

W. JOACHIM *v.* O'SHANASSY. (*a*)

A. JOACHIM *v.* O'SHANASSY. (*a*)

Motion for a rule *nisi* in each of the above actions, in the first by *Butler*, Q.C., for the defendant ; in the second by *Darley*, for the plaintiff. The facts and arguments appear in the following judgments. (*b*)

THE CHIEF JUSTICE said that in the action brought by Annie Joachim a rule ought to go on the first ground, and the first ground only. That ground was, "that his Honor, it is submitted, erroneously held that the plaintiff, in order to succeed in this action of trespass, was bound to prove that she occupied the land within a month from the date of the conditional purchase thereof." The point there raised had never been decided by the Court, and was, in his Honor's opinion, worthy of argument and decision. At the trial his Honor had ruled that it was necessary for a free selector who brought an action for trespass on his selection to prove not only that he had made a proper application and paid the deposit, but also that he had gone into occupation within a month from the date of the application. And that question had never been before the Full Court. No doubt the 12th section of the Crown Lands Occupation Act provided that the conditional sale of any portion of land should cancel so much of the lease of the pastoral tenant as related to that land; still there was the positive direction in the Alienation Act that the selector should go into occupation within a month. It had been said in argument that non-occupation by the selector within the specified time did not affect his relation to the squatter, but only gave the Crown power to forfeit their selection. But the power of forfeiture was given by the 18th section, and related only to non-compliance with the subsequent conditions of residence and improvements. The language of the section was "on default of a compliance with the requirements of this section;" but the condition of occupation within the month was imposed by the 16th, not the 18th. His Honor had been of opinion at the trial that occupation within the month was not a subsequent condition, the breach of which subjected the selection to forfeiture, but a preliminary and necessary condition of the selector's title. At any rate, the question was worthy of decision, and the rule ought to be granted. On the 2nd ground, viz. : "that his Honor erroneously left to the

(*a*) June 14, 1875. (*b*) The report is taken from the *Sydney Morning Herald* of June 17, 1875.

jury the question whether, admitting the facts as proved on the part of the plaintiff, her occupation of the land was an occupation within the meaning of the 16th section, instead of directing them that if they were satisfied as to those facts, such an occupation would be proved," there ought to be no rule. Even if the jury might have been misled by parts of the summing up, yet, upon the whole direction, taking it altogether, they were not likely to go wrong. Besides, it did not appear that the jury were influenced in their verdict by the direction. They seemed to have rather gone on the ground that the plaintiff never was on the land at all on the alleged day. His Honor was also still of opinion that the question of occupation or no occupation was a question of fact for the jury. The third ground taken was "that his Honor erroneously refused to receive in evidence certain plans sent by Finlay to William Joachim, on behalf of the plaintiff." On that ground, also, there ought to be no rule. It appeared that Joachim, shortly after going upon the selections, had applied to Finlay, a surveyor, for a sketch for his guidance, and a plan was tendered in evidence said to have been given by Finlay to Joachim. It was rejected on the ground that it had not been brought to the knowledge of the defendant, and there was no Act of Parliament which gave any power to a surveyor—whether a Government surveyor or only licensed—to prepare a plan or to make a statement which could bind these parties. His Honor was still of opinion that that evidence was rightly rejected. The fourth ground was that the verdict was against evidence. The rule ought clearly not to go on that ground. Joachim, senior's, evidence ought to go for nothing, as it did not touch the question of occupation. He did not go out with the children; he did not see the tent there; nor could he, of his own knowledge, speak as to the spot where they slept. The only witnesses were Filgate and John Thomas Joachim. Filgate certainly said that the tent was put on the peg, and that it was taken away the next morning, but then he said that it was not taken out again for ten days. Joachim, senior, said that it came in every morning, and went out every night. Young Joachim's statements fluctuated, but he said in one part of his evidence that it did not go out at all the first week. Then, from the surveyor's evidence it appeared that from where Annie's hut afterwards was to where the corner pin ought to have been was 24 chains (528 yards). Filgate said that the tent was shifted to where the hut was, and that its original position was more than 100 yards away, but nothing like 500. Then there was the evidence of people whose business it was to look out for any signs of occupation, and they swear that they saw no tents nor even

marks of camp fires. Then there was Milledge's positive and most clear evidence that he was out in the neighbourhood of these selections in the evening and again before sunrise in the morning, and he never saw any tents there, or any being carried or removed. It would run counter to all the recent decisions of the Court if even a rule *nisi* were granted on the ground of this verdict being against evidence. Then as to the other action in which William Joachim was plaintiff, the rule ought to be refused on the 4th, 5th, and 6th grounds, which had been already decided by the Court. These related to the validity of selections by infants, which could not now be questioned after the decisions of the Court in other cases. Upon the 3rd ground, that the verdict was contrary to law, and to the direction of his Honor, a rule ought to go. He had directed a verdict for the defendant on the ground that the plaintiff had not complied, in the description in his application, with the requirements of the Act. The jury had found a verdict for the plaintiff. Upon the 7th ground the rule ought to be refused. His Honor had still doubt whether the entries in the land agent's book, which were not in his own handwriting, or in the handwriting of his clerk, should be admissible in evidence; but, as Mr. Justice *Hargrave* and Mr. Justice *Faucett* were clearly of opinion that such entries ought to be admitted, his Honor was not disposed to differ. The rule must, therefore, be refused on the ground which complained of the admission of that evidence. The next ground was that the application, being signed "William Joachim, junior, agent for William Joachim," ought not to have been admitted as the application of William Joachim, junior, in his own right. Under the circumstances, this would appear to have been a mere slip, which ought not to vitiate the application, and there ought to be no rule on that ground. On the 9th ground, which was substantially the same as the first and second, the rule ought to go. It was as follows:—"That the alleged conditional purchase was invalid, inasmuch as the description in the written application was not in accordance with the requirements of the Crown Lands Alienation Act, the land described in such application not being a square block, nor the boundaries thereof directed to the cardinal points of the compass, nor the depth of the same that required by the Act." This point was worthy of argument. The 10th ground was that the description in the application was unintelligible and inconsistent. The description was, "commencing at the north-east corner of George Joachim's selection, thence north-easterly along the railway reserve 60 chains, then west, &c." At the trial his Honor had refused to hold that the application was unintelligible, though he had doubts upon the

point. It was proved that the boundary could not run along the railway line, which was some sixty chains to the east of the starting point. It was a point worthy of argument whether the words "north-easterly" were not too vague, as no fixed point was given to which the line was to run, or whether they meant due north-east by the compass. On this ground, therefore, the rule ought to go. On the 11th and 12th grounds there ought to be no rule. His Honor was clearly of opinion that, although according to former decisions of the Court a father could take up land for his son, he could not make any admission which might be to the prejudice of the infant. In these grounds the points taken were, that his Honor had improperly excluded evidence of a declaration made by William Joachim, senior, and of admissions made by him in a conversation with the Minister for Lands. His Honor was still of opinion that that evidence was rightly excluded. The last ground was that the verdict was against evidence. Now a plan was before the jury at the trial which shewed the position of William Joachim's hut. Joachim, senior, had said that the hut was two chains away from where the tent was placed on the first night. The tent was further to the west. The hut, as marked on the plan, was altogether outside William's land, and at some distance from it. Finlay, the surveyor, who had made the plan, said that from the hut to the nearest point of William's eastern boundary was three chains. Filgate, Joachim's man, said that the tent originally stood thirty yards to the south-west of where the hut was afterwards put up. If either Filgate's or Joachim's account was to be believed the tent was never on William's land at all. After the surveyor had given this evidence, Joachim went back into the box and corrected himself, saying that the tent was three or four chains to the west of the hut. That would bring it upon the selection; but when evidence was given in this way at a critical point in the case it was not satisfactory. Certainly young Joachim swore that the tent was eighty yards (nearly four chains) from the hut, but this was after Finlay's evidence had been given, and the witness did not shew himself very reliable in statements of distance. Then, on the other hand, there was the evidence of Fitzgerald that he had ridden over the ground, and had never seen any tent there, though Joachim said it was not taken away but remained there for a month. If Joachim's first evidence, and Filgate's evidence, as to the distance of the tent were believed, then the verdict was demonstrably wrong. Under these circumstances, and considering that the rule was granted on other points, his Honor thought that the defendant should have an opportunity of arguing that the verdict was against evidence, and the rule ought to go on this ground also.

Mr. Justice HARGRAVE concurred with the *Chief Justice* in thinking that the first ground taken in the motion in *Annie Joachim's case* raised a most important question, and one which was well worthy of decision by the Court, and he agreed in granting a rule upon that point. As to the ground of misdirection in leaving the question of occupation as a matter of fact to the jury, the word "occupy" was used in many Acts of Parliament, English as well as colonial, and it had always been the practice for Judges to tell the jury what constituted occupation. If the facts in this case did not amount to occupation, nothing would. Here was the land claimed and pegged out; the children were sent out every evening; and substantial buildings were afterwards erected, shewing the clear intention to reside upon the land. If that was not occupation, no selector in the country had occupied, and all the selections would be open to question by any squatter on whose run they might have been taken up. His Honor would have told the jury that the facts, if they were proved, made out a clear case of occupation; and the rule ought to be granted on that ground also. Then the plan sent by the surveyor to Joachim, sen., ought to have been admitted in evidence, not because it bound the parties—that had nothing to do with it—but because it was a part of the whole transaction of taking up this land for this infant. A will was held admissible in the case of *Watson* v. *Watson*, decided the other day by the Court, on the express ground that it was one of the surrounding circumstances which the jury had to take into account. His Honor was always against the rejection of evidence if it could be made in any way admissible, and thought that this evidence ought to have been admitted. The Court should always be slow in holding that a verdict was against evidence, but here, taken in connection with what the *Chief Justice* said in his summing up about occupation, which probably influenced the verdict of the jury, the verdict seemed to his Honor not to be justified by the evidence, and the rule ought to be granted on that ground also. Then in William Joachim's action his Honor concurred with the *Chief Justice* in refusing the rule on the 4th, 5th, and 6th grounds, which had already been decided by the Court. It was quite right to put them in the memorandum, so as to take advantage of the appeal to the Privy Council if the decision there should be against selections by infants, but the Court could not entertain them so long as its own decision remained unreversed. His Honor also agreed that the entries in the book kept by the land agent were rightly admitted in evidence, and that the evident mistake in the signature to the application was no ground for rejecting the application. But on some of the other points his Honor regretted that

he felt bound to differ from the *Chief Justice*. On the question whether the verdict was against evidence, there were no special grounds, as in the other case, for saying that the verdict was wrong. There was abundant evidence before the jury, if they believed it, which would justify their findings, and the *Chief Justice*, in his summing up, had pointedly called their attention to the discrepancies and contradictions. Their verdict, therefore, ought not to be disturbed. The 1st and 9th grounds had reference to the directions in the 17th section of the Lands Act as to measurements of boundaries. His Honor was clearly of opinion that those directions were not imperative. There was nothing new in the enactment that the blocks should be rectangular, and the lines run to the cardinal points. Ever since 1842 the regulations as to taking up land were similar. The Imperial Statute, 5 and 6 Vic., c. 36, s. 15, enacted that unsurveyed lands, taken up in 20,000 acre blocks, should be measured in parallelograms, of which no one side was to be more than twice another side. Suppose that one of these blocks had one side a few yards longer than the regulation, according to the view now put forward for the first time the title would be rendered invalid. In the regulations of 1843, of 1847, of 1848, of 1850, and of 1851 there were similar directions that the blocks should be "rectangular" "parallelograms," "two of the sides directed to the cardinal points," and prescribing a certain depth of frontage. Was it to be said that some slight error in attempting to comply with these directions was to invalidate the titles of all the people who had taken up land under these regulations and held it for years? Every squatter who had purchased lands before the Act of 1861, every purchaser from him, was to be at the mercy of any one who chose to trespass on his land. When he brought an action he would be told that he had not complied with the conditions; that his boundary line was a few yards out, and that his whole purchase was invalid and bad. His Honor would not be a party to granting even a rule *nisi* to argue such points, and thereby throwing doubts on nearly all the freehold titles in the colony. On all the remaining points, also, the rule ought to be refused.

Mr. Justice FAUCETT agreed with their Honors in thinking that in A. Joachim's action the first ground was worthy of argument and decision. As to the second ground, that the *Chief Justice* had misdirected the jury, his Honor thought that the ruling was most correct. Under the circumstances of the case, it became a question of fact for the jury whether there was occupation. It was pointed out over and over again in the course of the summing up that to constitute occupation there must be an intention of remaining and taking possession. So that the jury were told clearly

enough what occupation was; all that they had to do was to find whether under the facts in this particular case there was occupation within the meaning of his Honor's definition. It was impossible to see how the summing up could be complained of unless (as too often was done) a particular portion was read by itself without the qualifications to be found in other passages. Then as to the rejection of the plan sent to Finlay. His Honor was himself always disposed to admit evidence if possible, leaving the risk to the person who tendered it; but in this case it appeared that the plan was tendered as evidence, not on the ground that it was correct, but merely because it came from the surveyor. That was no ground. No surveyor could add to the title of a selector or take away from it. His title depended simply on the correctness of his application and the payment of the deposit. Then it was said that the verdict was against evidence. It was quite clear that the plaintiff had no case, according to her own witnesses, unless she was on the ground on the 20th of March. As to this there was evidence on both sides. There was positive evidence that the tent was on the ground, and there was the evidence of other persons that they were near the spot early in the morning and late at night, and saw no tent at all. It was said that this was only negative evidence, but it was for the jury to judge of all the probabilities of the case. They might have thought it a very improbable story that the tents were taken out every night and brought in again in the morning, and if so they were entitled to disbelieve it. It was impossible to disturb the verdict on that ground. Then it was said that if the verdict were taken in connection with the *Chief Justice's* ruling on the question of occupation, it was against evidence. His Honor could not see how that ruling could have influenced the verdict. If the jury were satisfied that the plaintiff was there on the night in question, in his Honor's opinion they could not have had the slightest doubt of the intention to occupy. In *William Joachim's case* his Honor thought that the points reserved were worthy of consideration. It was most important to decide whether the selector must describe the land applied for with strict accuracy; whether his boundaries must be distinctly directed to the cardinal points; and whether a line described as "north-easterly" was to invalidate the whole application. His Honor's own impression was (subject to argument) that it would be a very serious thing if a selector was liable to have his title destroyed by a misdescription, where it could be reasonably corrected when the land came to be surveyed. That would be if it were a slight error; the land, no doubt, must be substantially what was applied for. These points were of sufficient importance to justify a rule *nisi*, and there was no

ground for fearing that landed property would be damaged in consequence. Uncertainty as to the state of the law was far more likely to be injurious to titles than a decision after full argument. The point that the verdict was against evidence assumed an importance if the other points should be decided in favour of the defendant, and his Honor thought that there was quite sufficient ground for granting a rule *nisi* on that point also. But it might turn out on argument that there was no necessity for the plaintiff to prove as much as he had tried to do, and that he had laid his grounds too high. On the other grounds his Honor concurred with the *Chief Justice*.

Rule granted in A. Joachim's case on the 1*st ground only. Refused on the* 2*nd*, 3*rd, and* 4*th.*

Rule granted in W. Joachim's case on the 1*st*, 2*nd*, 3*rd*, 9*th and* 10*th. Refused on the* 4*th*, 5*th*, 6*th*, 7*th*, 11*th and* 12*th.*

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN THE SECOND TERM, 1877.

EX PARTE HASKING—RE FARNSWORTH. (a)

Quo Warranto—Municipalities Act of 1867, *s.* 66—*Description of Candidate in Nomination Paper.*

In a paper signed by two ratepayers of a municipality nominating F. as a candidate for the office of alderman, F. was described as a "freeholder," and his place of residence was not mentioned.

Held, that the election was void, and a rule *nisi* to oust F. from the office of alderman made absolute with costs.

Ex parte Gow (March 21, 1873) followed.

Sir *George Innes* moved to make absolute a rule *nisi* granted by *Faucett*, J., calling on one F. J. Farnsworth to shew cause why he should not be ousted of the office of alderman for the municipal district of Inverell. The nomination paper required by s. 66 of the Municipalities Act was in the following terms—"To Alderman Jenkins. Sir,—We, the undersigned ratepayers, do nominate Mr. Festus John Farnsworth, freeholder, as a candidate for alderman. We are, &c., Bartholomew Gleesan, farmer, near Inverell; Gottlob Brosi Vignion, near Inverell." Other grounds were taken in the rule *nisi*, but the principal ground relied upon was that "freeholder" was not a description of the candidate's occupation within the meaning of the Act. The case of *Ex parte Gow—Re Mossman* (b) was referred to. There the word "freeholder" was held an insufficient description; and a rule made absolute for a *Quo Warranto* with costs.

(a) June 4. (b) March 21, 1873, coram HARGRAVE, CHERKE, and FAUCETT, JJ. The report of the case in the *Sydney Morning Herald* was referred to and was confirmed by HARGRAVE and FAUCETT, JJ., from their notes.

The respondent was not represented by counsel, nor did he appear, or make any affidavit, but there was evidence that he had acted as an alderman and attended meetings of the municipal council.

PER CURIAM. (*c*) This case is settled by *Ex parte Gow*. But, independently of authority, our decision would have been the same.

Rule absolute with costs.

Attorney for the applicant—*Brennan*.

EX PARTE READFORD. (*a*)

Practice—Examination of Attorneys—Articles not expired.

The Court directed the examination of an articled clerk whose articles would expire after the day of examination, but before the day fixed for the admission of attorneys.

Darley moved for an order directing the examiners to examine the applicant, an articled clerk, the period of whose articles would expire on the 26th instant. The day fixed for the examination was the 21st instant, and the last day of Term on which attorneys would be admitted was the 31st. The examiners had been served with notice, but did not appear or object.

PER CURIAM. (*b*) Order as asked.

LONG *v.* DRINAN. (*a*)

Trespass—Possession by license—Evidence in aggravation of damages—Conduct after action brought.

The plaintiff in an action of trespass claimed under an authority from the owner of the *locus in quo* to go upon it and cut timber. At the trial he tendered evidence of acts done by the defendant after action brought, and shewing a persistence in his claim to the ground on which the plaintiff was working. The *Chief Justice* excluded the evidence. On a motion for a rule *nisi* to set aside a nonsuit on the ground that the evidence was improperly excluded,

Held (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dubitante*), **that the ruling was right.**

Foster moved for a rule *nisi* for a new trial in this action upon the following ground:—That his Honor the *Chief Justice* ruled at the trial that the plaintiff could not give evidence of acts done

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(*c*) Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.

(*a*) June 4. (*b*) Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.

(*a*) June 4.

by the defendant after action brought, shewing a persistence on his part in his claim to the land in dispute in the issues joined under the first count, and continued opposition to the possession thereof by the plaintiff, and that the plaintiff could not enhance the damages by such proof beyond the value of the goods taken.

DECLARATION. (1) That the defendant broke and entered certain land of the plaintiff, &c., whereupon certain timber of the plaintiff was then lying cut, and took and carried away the said timber, and converted and disposed thereof to his own use; by means of which said premises the plaintiff was annoyed, prejudiced, injured, and disturbed in carrying on his business as a fencer, and in putting up and completing a certain fence on the eastern boundary of the said land, for reward to the plaintiff in that behalf, and was deprived of the use and benefit of the said timber, and of the labour and skill of the plaintiff bestowed in procuring the said timber, and lost and was deprived of great gains and profits in respect thereof.

(2) Trespass to goods by removing timber and fencing stuff.

(3) Trover of the same goods.

PLEAS. (1) Not guilty; (2 and 4) not possessed; (3) as to first count, *Liberum tenementum.*

NEW ASSIGNMENT upon the 2nd and 3rd pleas.

PLEA TO THE NEW ASSIGNMENT. Payment into Court of 40s.

It appeared from the evidence at the trial that the plaintiff contracted with Mr. Hungerford to put up a fence dividing his land from the defendant. Mr. Hungerford gave the plaintiff the following authority:—"I hereby authorise and direct you to split all available timber on the strip of land, portion of the Wyndella estate, viz., between the old fence on the eastern side of the estate, and the line lately marked by the Government surveyor as the west of the adjoining land lately sold by Government to different parties." While the plaintiff was splitting on this land, the defendant came upon it and took away some of the stuff so split by the plaintiff. It appeared that the value of the timber so taken was only 6s. 6d. The plaintiff's counsel proposed to give in evidence acts of the defendant after the commencement of the action, to shew (by way of enhancing the damages) that the defendant had contended and persisted in his claim to the land upon which the plaintiff was working. The *Chief Justice*, before whom the case was tried at Maitland, refused to admit such evidence, and the plaintiff elected to be nonsuited.

Foster. We say that the continued claim of the defendant to the land enhanced the damages inasmuch as the plaintiff, under the authority from Hungerford, had a right to the possession of

the land, and it was competent to him to shew the nature and circumstances of the trespass by which his possession was interfered with. *Dyson* v. *Collick* (*b*) is a case in point, and shews what possession will maintain trespass. Here the written authority amounted to a lease of the ground for a particular purpose until that purpose had been fulfilled. Even if it had only created a tenancy at will, the plaintiff would have been entitled to bring trespass. Nothing is necessary but that the plaintiff should have the exclusive possession of the land. [Sir JAMES MARTIN, C.J.: If a man gives another leave to go on his land to cut timber, does that give the licensee exclusive possession, so as to enable him to maintain trespass?] Where a man by the leave of the owner has piled timber up on land, does not that give him possession of the land covered by the timber? If we had an interest in the land, we say that the continuance of the defendant's claim to it enhanced the damages caused by his trespass. It shewed that the trespass was not casual, but wilful and persistent. [FAUCETT, J.: Do you not really seek damages for being prevented from carrying out your contract? Is not that your cause of action?] Yes; we were prevented by the act of the defendant in coming upon our land. [FAUCETT, J.: You might have sued for the injury done to you without asserting exclusive possession, as you have done by bringing an action of trespass.] This is one of those cases where the action of trespass comes very near the action upon the case.

Sir JAMES MARTIN, C.J. (after stating the pleadings in the action). During the trial it came out that the plaintiff's claim to maintain an action of trespass arose out of an agreement with a Mr. Hungerford. It being quite clear that trespass cannot be brought unless the plaintiff has an exclusive right to the land, the plaintiff sought to make out this exclusive right by an authority from Mr. Hungerford to go upon the land in question. The paper was in these terms. [His Honor read the document above referred to.] No particular portion of the land was pointed out, nor any locality mentioned, but the plaintiff was to go upon the strip of land mentioned in the authority, and cut timber anywhere upon it. It was upon this permission that the plaintiff brought this action. The trespass complained of was the going upon the land and removing pieces of timber. The value of the timber taken before the commencement of the action was about six shillings. It appeared that considerably more timber was taken afterwards, but by the plaintiff bringing this action so soon, the inquiry at the trial was limited to the value of the timber which had been taken at that time. The plaintiff's counsel,

(*b*) 5 B. & Ald., 603.

seeing that if he was limited to the value of the timber taken before action brought, his client would fail in establishing damages over the amount paid into Court by the defendant, sought to enhance the damages by giving evidence that after the action was brought the defendant asserted a right to the strip of land on which Hungerford gave the plaintiff permission to split, by taking away more timber. This evidence was tendered on the principle that in an action of trespass a plaintiff may not only shew the actual damage resulting from the trespass, but may also shew the way in which the trespass is committed, by way of aggravation of damages. Juries are often told that they are entitled to consider not only the actual damage done, but the circumstances under which it was done; for instance, that the defendant acted in an insulting manner, or in the assertion of a right adverse to the plaintiff's possession, and injurious to his title; and for the purpose of shewing the intention of the defendant, evidence of acts done by him after action brought is often admitted. But a rule of this kind must be looked to with reference to the position of the plaintiff in each case. If the plaintiff is not the owner of the land trespassed upon, it is of no importance to him whether the trespasser is owner or not. Even if the plaintiff here had a right to bring an action of trespass at all, the evidence sought to be given could not affect the damages to which he would have been entitled. I am therefore of opinion that I rightly excluded the evidence.

But it further appears that the plaintiff had under that authority a mere right to go upon land and had not even an exclusive right to cut down trees there, and therefore that an action of trespass to land is not maintainable at all. The law on this subject is clearly laid down in two cases, *Wilson* v. *Mackreth* (*c*) and *Crosby* v. *Wadsworth* (*d*). Those cases shew beyond all question that the plaintiff cannot recover in this form of action unless he has a right to the exclusive possession of the land. For these reasons I think that the rule should be refused.

HARGRAVE, J. In this case I must differ from his Honor the *Chief Justice*, because I take a wider view of the nature of the action of trespass to land. I consider that trespass may be maintained by anyone who, though he has not the possession of the soil, has what in conveyancing is called an incorporeal hereditament. Anyone who has the right to go over the land, or, as in this case, to cut trees upon the land, may maintain trespass if his right is interfered with. He is to cut trees, that is, to cut something inherent in the land. That is what gives him the right to bring trespass. It is not necessary that he should have

(*c*) 3 Burr. 1822. (*d*) 6 East 602.

the possession of the land for all purposes; it is sufficient if he is given possession for some special purpose, until that purpose is completed. I can see no indefiniteness in the agreement; the area within which he is to work is clearly specified. I think, therefore, that the plaintiff had the right to bring this action. Then what happens upon the trial? He wanted, with the object, as stated by the *Chief Justice*, of enhancing the damages, to bring in the evidence of what the defendant did after the commencement of the action. I think he was entitled to give such evidence to shew that the defendant had persisted in his tortious act in excluding the plaintiff from his rights upon this land, and had committed the trespasses deliberately and in the assertion of a right to the land. What I have said has reference only to the granting of a rule *nisi*; I go no further than that; but for the reasons I have given I think that the rule asked for ought to go upon the ground taken in the memorandum.

FAUCETT, J. If a new trial is granted the only effect will be to send down for another trial a case where it is admitted the plaintiff has only sustained damages to the extent of 6s. 6d., and where the defendant has already paid 40s. into Court. I do not see what we are sitting here for if cases of such a trivial character are to be treated in this way. Wherever the amount of damages is under £20, the plaintiff must make out very strong grounds to entitle him to a new trial. But here I cannot see anything more in this agreement than a license to go upon the land; it clearly gives no right of possession at all, or even an exclusive right to go upon the land. The case cited by Mr. *Foster* seems to me clearly against him. There the plaintiffs built a dam with their own materials upon the land of another person, and were in actual possession of the dam. Until the dam was completed, the plaintiffs were entitled to the possession of it and were allowed to maintain trespass in respect, not of the land on which the dam stood, but of the dam itself. The judgment in *Dyson* v. *Collick* draws the distinction in the following terms:—"This case is distinguishable from the *Duke of Newcastle* v. *Clark* (*e*), for there the Commissioner of Sewers had no possession, *but had a mere right to enter upon the locus in quo and to do certain acts.*" That is precisely the case here; the plaintiff had a mere right to enter upon the land and cut down trees. That case, therefore, is a clear decision that the plaintiff cannot maintain trespass. I had some doubts during the argument whether the count in trespass might not be supported as a claim for the injury alleged by way of consequential damage; whether it might not be treated as a count for interference with the plaintiff's right of cutting trees on this

(*e*) 8 Taunt. 602.

land; and whether the consequential damage alleged might not be considered the substantial cause of action. But the case has not been put upon that ground, and it is therefore unnecessary to offer any opinion upon the point.

PER CURIAM. Rule refused.

Attorney for plaintiff—*Mullen.*

CHALLONER AND ANOTHER *v.* McPHAIL AND ANOTHER. (*a*)

Trespass—Damages—Deaths of sheep after action brought caused by want of grass—Intervening drought.

M.'s sheep trespassed on C.'s land. There was evidence that the sheep ate off the whole of the grass. A drought supervened, and the grass did not grow again. After action brought some 2000 sheep belonging to C. died. *Hargrave*, J., directed the jury that if the deaths of the sheep resulted from the grass having been eaten by the sheep of the defendants, the jury should take that into consideration in estimating the damages.

Held (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; Sir W. MANNING, J., *dubitante*), that the direction was right, and a rule *nisi* for a new trial on the ground of misdirection refused (Sir W. MANNING, J., *dissentiente*).

This action was tried at the last Deniliquin Assizes. The declaration was for trespasses committed by the defendants between the 20th of July, 1876, and the 31st of January, 1877. The defendants paid £100 into Court. Evidence was given at the trial that the defendants' sheep ate up all the grass upon the plaintiffs' land; that in consequence of the ensuing drought no fresh grass grew; that the plaintiffs' sheep deteriorated from want of food; and that about 2000 of them died, but, as it was admitted, after the commencement of the action. There was evidence that their death resulted from the want of grass and their consequent starvation. The defendants' case was that the land of the plaintiffs (who were selectors) consisted only of 1500 acres; that the land would only feed a sheep to four acres, whereas they had 2800 sheep there; and that the sheep would have died of starvation from the dryness of the season alone, without any trespasses by the defendants. *Hargrave*, J., admitted evidence of the deaths of the plaintiffs' sheep after action brought, and told the jury that, if they thought that the deaths resulted from the trespasses by the defendants, then, even though they happened after the commencement of the action, the plaintiffs would be entitled to damages for the loss by such deaths. The jury found a verdict for the plaintiffs for £215 over the sum paid into Court.

(*a*) June 5.

Salomons now moved for a rule *nisi* for a new trial upon the grounds of the wrong admission of evidence, and of misdirection. In this case the learned Judge told the jury they could take into consideration the deaths of the plaintiffs' sheep after action brought. [Sir JAMES MARTIN, C.J.: I cannot see why, if an animal died after action brought, so long as it can be said to have received its death-wound before, the plaintiffs could not recover for it.] We say that we are not responsible for the death of the sheep at all. Our sheep ate off their grass during the drought; no rain came, and the grass did not grow. The sheep died afterwards, and our contention is that the damages are too remote. The drought could not have been anticipated by us. It caused the deaths. [Sir JAMES MARTIN, C.J.: Is not that a matter of fact, with which we have nothing to do?] No; it is a question of law whether the damages are too remote. [Sir W. MANNING, J.: Is not the real question what the value of the grass was; and do not the deaths of the sheep shew what the grass would have been worth to the plaintiffs?] The rule is that a defendant is responsible only for the ordinary natural consequences of his acts: *Sharp* v. *Powell* (*b*). Here the drought, which was the act of God, intervened, and we are not liable for its results. We are bound to pay for the value of the grass our sheep ate, but that was not more than £20 or £30, and we paid £100 into Court. [Sir JAMES MARTIN, C.J.: Surely grass is more or less valuable according to the season?] Why should a person leave his sheep there to die? he can travel them over the country. If he foolishly keeps them there, and they die, that is not our fault. [Sir W. MANNING, J.: That is my difficulty. Suppose there was a paddock close at hand in which the owner might have got good feed for them, how can he recover if they die from being kept at home?] We gave evidence that the plaintiffs' land was greatly overstocked, and that that was the real cause of the loss of the sheep. If these damages are allowed, there will be no limit in time to the defendants' liability. Suppose the drought had lasted a year, or two years, and the sheep had died at the end of that period, would it not be absurd to hold the defendants responsible?

Sir JAMES MARTIN, C.J. These questions of the measure of damages in actions of tort are confessedly of great difficulty, and sometimes turn upon points of extreme nicety. Judges have from time to time attempted to lay down general rules to act as a guide in all cases. All such attempts have more or less failed, and it has been admitted over and over again by the same Judges that every case in which damages are claimed must rest upon its own circumstances. No doubt general principles have been laid down which are

(*b*) L.R. 7 C.P. 256.

some guide, but they do not embrace all the circumstances of any one particular case. The rule as to the measure of damages laid down in actions of contract is obviously not applicable to such cases as the present. So in actions like that to which reference has been made during the course of the argument, where there was an accident. It was not a trespass, but a mere accidental act, causing other acts from which damage ensued. No principle can be gathered from that case applicable to all cases. Another case, *Collins* v. *The Midland Level Commissioners* (*c*) comes nearer in its facts to the present case, but not near enough to be a guide.

The only general rule that can be laid down is this, that the defendant is liable for the *natural* consequences of his act. It is impossible to define it more than that. Anything that *naturally* follows from the tortious act of the defendant ought to be taken into consideration by the jury in estimating the damages.

In actions of trespass we often have evidence given of the value of the grass eaten by the defendants' sheep, and in a general way that is perfectly legitimate evidence. Everyone must see that in a country liable, as this is, to long and severe droughts, the value of grass must greatly vary. In a good season it has almost no value; but when there is a drought, and thousands and thousands of acres have no grass on them, it then becomes extremely valuable. Therefore the damages for eating grass must vary according to the circumstances and, amongst others, the nature of the season.

Now in this case the plaintiffs occupied about 1500 acres, not a very large piece of land, and had 2800 sheep. There is evidence that that number was far more than this land would properly sustain; while there was also evidence that 40 or 50 acres were laid with English grasses, which would be much more valuable. Therefore it was a question for the jury upon this evidence whether, if the sheep had been left to themselves on the plaintiffs' land, they must have starved. That was a question of fact for the jury, who would not have been justified in giving the plaintiffs damages for the deaths, if they arose from overstocking. The trespasses by the defendants began in June and went on all through the winter and the spring, when the grass would have been growing, and two months of the summer. The sheep of the plaintiffs kept about this place began to lose their condition, and suffer from want of food. They did not die off all at once, as if they had been poisoned by the act of the defendants, but, there being less and less food every day, they gradually got into such state as to die of starvation. His Honor told the jury that, if the deaths were in their opinion brought about by the trespasses of the defendants upon the plaintiffs' land, they could take that into account in

(c) L.R. 4 C.P. 279.

estimating the damages. That is the direction which is now complained of.

The question is not altogether free from difficulty, but on the whole I think that his Honor's direction was right. The defendants had no right to expect that the plaintiffs would take the sheep off their own holding and travel them about in search of grass. Whatever the cause of death was, the jury had to determine it, and the jury were not told to take the deaths of the sheep into consideration unless caused by the acts of the defendants. I think that if sheep are by the defendants' trespasses deprived of their natural food and ultimately starve and die, that is the natural and immediate consequence of the defendants' acts. The jury may have been wrong in coming to the conclusion that the deaths arose from this cause, but it was a question for them upon the evidence, and I am not called upon to say whether I agree with their verdict. Although the question raised by this rule is one of some difficulty, still, as my own opinion is clear after hearing argument, I think the rule should be refused.

HARGRAVE, J. I concur with the *Chief Justice*. This question first arose at the trial when Mr. *Salomons* objected to any evidence being given of the deaths of the sheep after action brought. I admitted the evidence as part of the *res gestæ*. Then, the evidence being before the jury, was it not for the jury to decide the cause of the deaths of the sheep? Was it not both according to common sense and law to leave this question to them? All the acts and conduct of the defendants were clearly before the jury. It was proved that for six months their sheep had been eating the grass off the plaintiffs' land and their grazing rights besides. And the only defence offered for these most tortious acts of the defendants in going over land kept by the plaintiffs for summer feed was that the plaintiffs' land was overstocked. The defendants' superintendent said that it could not carry so many sheep as were on it. Of course, the jury ought not to have given damages if the sheep died from overstocking, but upon the clear preponderance of evidence they found that the sheep died in consequence of the plaintiffs' trespasses. I quite agree with the verdict, and think that my direction was quite right. There ought, therefore, to be no rule.

Sir W. MANNING, J. I am sorry not to be able to agree with their Honors. To my mind the question is at least worthy of argument. This being an application for a rule *nisi* only, it is not necessary to decide the point absolutely, but my present impression is in favour of Mr. *Salomons'* contention, that the deaths of the sheep are too remote to be recovered for by way of damages. The deaths do not seem to me the natural consequence of the

grass being eaten before the drought. The ordinary measure of damages in an action of trespass of this kind would be the value of the grass, or what grass could have been supplied for in the place of that which had been eaten. If, for instance, fodder was taken out of a man's stable, and he neglected to supply any in its place, and his horses had died of starvation, could he claim more damages than the value of the fodder? Here the fact probably was that the sheep were kept on the land in hopes of rain coming, but as it did not come, they died ultimately of starvation. It seems to me a most dangerous doctrine to hold that such damages are recoverable. Where is the line to be drawn? Suppose the drought continued for twelve months after the trespasses, and that at the expiration of that time the sheep died, how could it be said that they received their death-wound from the original act of the defendants? I do not wish to go into questions properly for the jury, or to interfere with their province as judges of the facts, but I think that his Honor's direction here, when he told the jury to consider whether the deaths were in fact caused by the defendants' acts, though right in form, was not in substance. Of course the cause of death was a matter of fact for the jury, but in my opinion it was for the Judge to say whether that fact could affect the damages. The direction practically left it to the jury to consider the deaths in estimating the damages, if caused, however remotely, by the acts of the defendants. I think the remoteness of the damages is a question for the Judge, and that this Court can review his direction upon this point. I think the rule ought to be granted.

Rule refused.

Attorneys for the defendants—*Levy & De Lissa.*

CAFE *v.* MORRISON. (*a*)

Practice—Entering verdict on abandoned count.

Where a count was abandoned at the trial, and the jury found a general verdict for the plaintiff, the defendant should apply to the Judge who tried the case, and not to the Court, to have the verdict entered for him on the abandoned count.

This action was tried at the Mudgee Assizes in April last before Sir *W. Manning*, J., and a jury. One of the counts of the plaintiff's declaration was abandoned at the trial, and the Judge in summing up told the jury that the defendant was entitled to the verdict on that count. The jury returned a general verdict for the plaintiff.

(*a*) June 5.

G. M. Stephen now moved for a rule *nisi* for a new trial, or to enter a verdict for the defendant on the second count, on the ground that the verdict as to that count was perverse, and contrary to the direction of the learned Judge.

PER CURIAM. (*b*) The rule must be refused. The proper course is to apply to the Judge who tried the case; when, if the arrangement spoken of took place at the trial, he will enter the verdict accordingly.

Rule refused.

Attorney for the defendant—*Davidson.*

THE QUEEN *v.* BRADBURY.

Criminal law—Hindering or obstructing messenger of the Insolvent Court making attachment—5 *Vic., No.* 17, *s.* 75.

Upon the trial of an information charging the defendant with unlawfully and wilfully obstructing and hindering R., as messenger of the Chief Commissioner of Insolvent Estates, in making an attachment under the Chief Commissioner's warrant, the *Chief Justice* told the jury that it did not matter for the purposes of the prosecution whether the goods attached were the property of the insolvent or not, or whether they belonged to the defendant himself. The defendant was convicted.

Held (*per* HARGRAVE and FAUCETT, JJ.; Sir JAMES MARTIN, C.J., *dissentiente*), that such direction was wrong, and that the conviction should be quashed.

The case stated by Sir *James Martin*, C.J., in accordance with the Act 13 Vic., No. 8, was as follows:—

"This defendant was tried before me at the Circuit Court at Armidale on Tuesday, 10th April, 1877. There were three counts in the information. The first count alleged in substance that the estate of one Samuel Bowler Redgate was duly placed under sequestration as insolvent; that afterwards the Chief Commissioner of Insolvent Estates, by warrant under his hand, appointed one William Cooper Rogerson his messenger in respect of the said insolvent estate, and thereby authorised him 'to enter and seize and lay an attachment on the moneys, securities for money, estates, and effects, whatsoever and wheresoever they should be found, of the said insolvent estate, and to make an inventory thereof'; that the said Rogerson, acting under the said warrant, entered into and upon a certain house which at the time of the sequestration of Redgate's estate, 'was in the possession

(*b*) Sir JAMES MARTIN, C.J., HARGRAVE and Sir W. MANNING, JJ.
(*a*) June 8.

and occupation of him the said Redgate, and in which said house certain of the moneys, securities for money, estate, and effects of the insolvent estate of the said Redgate then were, and did levy an attachment upon the said moneys, securities for money, estate, and effects of the said insolvent estate of the said Redgate in the said house then being, and did leave one Robinson in the said house in custody thereof'; and that the defendant, knowing the premises, afterwards 'did forcibly eject and remove the said Robinson from the said house in which he had been placed by the said Rogerson as aforesaid and thereby unlawfully and wilfully did obstruct and hinder the said Rogerson as such messenger as aforesaid from making the said attachment.' The second count contained the same allegation as the first except that the house into and upon which it was stated that the messenger Rogerson entered by virtue of the Chief Commissioner's warrant was described, not as a house in the possession and occupation of the insolvent, but as 'a house called or known as Tattersall's Hotel.' The third count alleged, as in the preceding counts, the sequestration of Redgate's estate and the appointment of Rogerson as messenger, and that the defendant 'unlawfully, wilfully, and knowingly did hinder and obstruct the said William Cooper Rogerson, he being such messenger as aforesaid, in making an attachment of the said moneys, securities for money, estate, and effects of the said Samuel Bowler Redgate.'" [The case then set out the whole of the evidence given at the trial, which, for the purposes of this decision, it is not necessary to mention.] "At the close of the case for the Crown Mr. *Healy* submitted that there was no proof of the goods being Mr. Redgate's, nor was there any proof that the defendant was made aware of the order to Rogerson to attach. He further submitted that the order did not direct Rogerson to attach the goods in Tattersall's Hotel. I overruled these objections, being of opinion that it did not matter whether the goods were Redgate's or not; and I held that there was evidence from which the jury might infer that the defendant knew of the writ of attachment. The third point was, I thought, immaterial. After the evidence for the defence Mr. *Healy* addressed the jury for the defence, and I summed up in accordance with my previous ruling. I told the jury that it did not matter, for the purposes of such a prosecution as the present, whether the goods attached were the property of the insolvent or not; that, if they belonged to some other person, there were means open to the owner to establish his right and obtain such goods or their value, but that he must not decide the matter for himself by forcibly resisting the attachment, which was made, not for the purpose of disposing of the property, but for

securing it until the assignee or the Court determined what was to be done with it. That if the assignee sold the property, and it really belonged to the defendant, he could bring his action against the assignee, and that before any sale an application might be made to the Chief Commissioner or to the Court to stay any sale or to set aside the attachment. I further told them that if a person claiming goods attached in an insolvent estate could of his own motion resist the attachment on the ground of his ownership, the clause in the Insolvent Act authorising the Chief Commissioner to direct an attachment would be utterly useless. I also said that there was sufficient evidence to justify them in believing that the defendant had notice of the warrant authorising the attachment, and that, wherever the attachment was made, the defendant had no right to resist it of his own motion only. The jury retired, and after being absent nearly an hour they returned into Court and asked me if the defendant would be justified if the goods were really his, and I told them that that question was not material. They again retired, and returned into Court in about an hour and found the defendant guilty, but recommended him to the merciful consideration of the Court, considering that he did what he did do in the assertion of a right. I therefore sentenced him to six months' imprisonment in Armidale Gaol, but I respited the execution of the judgment on his giving bail to appear and render himself in execution at such time and place as the Court should direct. Mr. *Healy* requested me to reserve for the consideration of the Full Court the objections taken by him as above mentioned. The questions, therefore, for consideration are:—

"1. Was I right in telling the jury that it was immaterial whether the goods attached were in point of fact the defendant's or not?

"2. Was I right in telling the jury that there was evidence that the defendant, when he turned Robinson, the messenger's assistant, out of possession was aware of the warrant to attach having been issued?

"3. Was I right in telling the jury that it was immaterial that Tattersall's Hotel was not mentioned in the warrant to attach?"

The two last questions mentioned by his Honor in the above case were not argued by the defendant's counsel.

Section 75 of the Insolvency Act (5 Vic. No. 17) is in the following terms:—That if any person shall dispose of, remove, retain, conceal, embezzle, or receive any movable property, moneys or securities for money belonging to any insolvent estate, which has or have been attached by virtue of any order for the sequestration thereof, knowing the same to have been so attached

and with intent to defeat the said attachment, or shall hinder or obstruct, or endeavour to hinder or obstruct, the messenger or other person authorised to make the same, such person shall on conviction thereof suffer imprisonment with or without hard labour for any period not exceeding three years.

Butler, Q.C. (*Healy* with him), for the defendant. I will first refer to the case of *Cooper* v. *Asprey* (*b*). [Sir JAMES MARTIN, C.J.: It was on the principle of that case that I based my decision at the trial.] But we will distinguish between cases of contempt of the Court (which that was) and such a criminal offence as that charged here. But *Cooper* v. *Asprey* is not in accordance with all the cases. In *Day* v. *Carr* (*c*), and *Ex parte Page* (*d*) the decision was the other way. But it is admitted that the late case of *Ex parte Cochrane* (*e*) follows *Cooper* v. *Asprey*, and the principles there laid down must be taken as law. It is also admitted that if this were a question of contempt of Court, it would be no justification that the goods the messenger was attaching belonged to the defendant. But attachment of the person, and not a criminal prosecution, is the remedy for a contempt. The charge here is not for contempt, but for breaking the clause of a statute. A man has a common law right to protect his own property. Even in the case of search warrants a man may resist his property being taken away, if it is not that charged as stolen or unless required for purposes of evidence: *Crozier* v. *Cundey* (*f*). [Sir JAMES MARTIN, C.J.: Does that case shew that the officer can be prevented from making a search?] It shews that the officer is not justified in taking the goods. The common law right cannot be taken away without express words, and this section in derogation of them must be strictly construed. It speaks of "making the same." What does "the same" mean? An attachment upon goods belonging to the insolvent estate. By sections 21 and 22 of the Insolvent Act, it appears that an attachment can only be made of the property of the insolvent. These sections must be taken into account, and section 75 must be read with them. There is a late case which seems to be decisive: *Reg.* v. *Creese* (*g*). That was decided under the "Debtor's Act of 1869," s. 11, sub-s. 5, which substantially corresponds with the first part of section 75 of our Act. It was there held that property assigned to certain creditors under a void assignment was nevertheless not "the property of the bankrupt" within the meaning of the clause. That shews the strictness of construction of such sections. In *The Earl of Bristol* v. *Willsmore* (*h*) it was held that in an action for a rescue it was a

(*b*) 32 L.J.Q.B. 209. (*c*) 7 Ex. 853. (*d*) 17 Ves. 59. (*e*) L.R. 20 Eq. 282. (*f*) 6 B. & C. 232. (*g*) L.R. 2 C.C.R. 105. (*h*) 1 B. & C. 514.

question of fact for the jury whether the goods were the defendant's. [Sir JAMES MARTIN, C.J.: You began by admitting that an attachment would go against anyone who meddled with his own goods.] Yes, for the reason given in the cases, that they are in the custody of the law. That reason does not apply to a prosecution under this section. The rule of construction of criminal statutes is stated as follows in *Maxwell on Statutes* (*i*):— "No case shall fall within a penal statute which does not comprise all the elements which, whether material or not, morally, are in fact made to constitute the offence as defined by the statute." [Sir JAMES MARTIN, C.J.: That is not a very clear expression of the law.] The warrant to attach is itself restricted to goods belonging to the insolvent estate, and the messenger can have no authority outside of its terms.

Windeyer, A.-G. (for the Crown), supports the conviction. It is not necessary that the two parts of section 75 should be read together: they are quite divisible. It is quite sufficient, to constitute an offence under the latter part of the section, that a person authorised to make an attachment is hindered or obstructed. He may not have found any goods at all. The words are not "whilst making an attachment," but only "any person authorised to make an attachment." The object of the statute was to make an indictable offence what was before only a contempt. That the defence in this case would be no justification in a proceeding for contempt is clear from all the cases: *Ex parte Dixon* (*j*), *Cooper* v. *Asprey* (*k*), *Ex parte Page* (*l*). All these cases follow Lord *Hardwicke* in the principle he laid down in *Ex parte Titner* (*m*), that "though the taking of the goods by the messenger was illegal, yet the turning him out of possession by force cannot be justified, for the owner of the goods ought to have asserted his right by a due course of law." The law has simply made it an offence to interfere with the messenger in the execution of his duty, no matter when the interference takes place.

Sir JAMES MARTIN, C.J. In this case the defendant was indicted for a violation of the latter part of s. 75 of the Insolvent Act, which makes it an offence to hinder or obstruct, or endeavour to hinder or obstruct, the messenger or other person authorised to make an attachment. There were three counts in the information. [His Honor stated the counts.] At the trial it was contended on behalf of the defendant that it was open to him to shew that the house and goods did not belong to the insolvent at all; and evidence was given that some time previous to the sequestration the property had passed by a bill of sale to the defendant, and it was insisted that the goods being his, and

(*i*) p. 240. (*j*) 8 Ves. 104. (*k*) 3 B. & S. 932. (*l*) 1 Rose, p. 1. (*m*) 1 Atk. 136.

the warrant being only to attach the goods of the insolvent's estate, he was entitled to turn out the messenger. I held otherwise, upon the analogy of a levy by a sheriff's officer, that, although the goods are not the property of the person named in the warrant, the owner must not take the law into his own hands and judge for himself whose the goods are. I told the jury that it did not matter whose goods they were, and that if the sequestration had been regular and the warrant had been properly issued, and the messenger duly authorised had gone into the house for the purpose of seizing what he believed to be goods belonging to the insolvent's estate, then it appeared to me that no one was entitled to interfere with him. The owner ought to have made a summary application to the Chief Commissioner or, if he would not entertain it, to this Court; or, if the matter was not pressing, he could bring an action against the messenger and recover the goods. But the summary remedy of an owner taking possession of his goods, under these circumstances, by force was something which the law would not allow. And I now believe that I decided the question correctly. The cases which have been cited on the argument, though I had not access to them at the time of the trial, seem to bear out the view I then took. What are they? The first, *Ex parte Page*, was decided in 1810, and in 1875 the same principle is laid down in *Ex parte Cochrane*, viz., that it is equally a contempt of the Great Seal if the person who resists the messenger of the Court believes the goods to be his property. It is now said that the cases cited are all cases of attachment for contempt in disobeying the order of the Court. But why are the acts, that are so punished, contempts? Because they are wrong; because the law will not allow them. They are not indictable in the mother-country because there is no law that makes them so; but here we have a statute which gives the power of dealing in a way other than by process of contempt. But it is said that s. 75 contains certain words which make proceedings under it altogether nugatory; unless it can be shewn that the goods attached or about to be attached belong to the insolvent estate. I think that in support of a charge under the first portion of s. 75, it would be essential to prove that the goods alleged to be disposed of were part of the estate, and that is all that is decided by the case of *Regina* v. *Creese*. But that limitation does not apply to the latter portion of the section. The words are: "shall hinder or obstruct or endeavour to hinder or obstruct the messenger or other person authorised to make the same." Of course the warrant of attachment must be against goods of the estate, and the authority of the messenger must be limited to attaching those goods, and it would be necessary to state and prove that the messenger was

hindered and obstructed; but all this leaves open the question whether a person can decide the matter for himself by turning the bailiff out. It must be taken that the bailiff is acting in accordance with the law. He must necessarily decide what are the goods of the insolvent for the purpose of attaching them. He cannot take a Judge and jury about with him to decide the question of property; and he cannot be bound by what a man says as to his right to the goods. The section would be utterly futile unless the officer had the power of determining for himself what are goods belonging to the insolvent estate. It is not in accordance with the cases cited, nor in accordance with common sense, that the law should be as is contended for the defendant here. If it is, all the sections relating to the attachment of the goods of the insolvent estate may as well be taken out of the statute at once. I admit that the interpretation of this section is not altogether free from difficulty; at the same time, I am clearly of opinion that my ruling was right and that the conviction should be sustained.

HARGRAVE, J. The question on this case must turn entirely on the construction of the Insolvent Act, and it is clear that throughout all the Insolvent Acts there is not a single section which touches anything beyond the property of insolvents. The whole scope of the Acts is this—the estate under sequestration; and nothing more. Why, even in the first part of this 75th section, the property, which it is an offence to conceal, &c., is stated to be property belonging to the insolvent estate. We have now to decide whether we are to construe the latter part of that section as if it stood entirely by itself, not taking into consideration the former part, or the general scope and object of the statutes relating to insolvency. I was much struck by the Attorney-General's argument that a messenger might be hindered or obstructed before he came to where the goods were, and before he had attached any goods at all, either belonging to the insolvent or any one else. But that is not the case here; for in this particular case there is evidence that the messenger had already attached the property in question before the defendant interfered with him. Under these circumstances, I think that it was essential for the Crown to go into Court prepared to prove that the goods attached were the property of the insolvent. If we dispense with the necessity for such proof, and allow the messenger simply to say, "I believed that they were the insolvent's goods," we should be clothing these officers with roving commissions to go all about the country and attach the goods of anyone in any place they pleased. No one would be secure from having his goods seized on the pretext that they belonged to an insolvent estate. I think the conviction ought not to stand.

FAUCETT, J. No doubt it is very wrong to interrupt or interfere with a messenger of the Insolvency Court in the execution of his duty; no doubt it is a high contempt of Court; and I believe it can also be punished under another Act which has been referred to; but it is quite a different question whether an information under section 75 of the Insolvency Act can be met by a defence that the property attached did not belong to the insolvent estate. Where the messenger is on his way to search, it may well be an offence to obstruct him. But that is not the question here. Under the special circumstances of this case, it appears that the goods were actually attached before there was any interference by the defendant. It comes to this—suppose a person enters my house, and begins to seize my property before my face; because he comes in under colour of the warrant and says that my property is the property of an insolvent, however groundlessly, am I liable to be prosecuted because I turn him out? It is clear that an attachment under the Act must be of the goods of the insolvent. And in the beginning of the section an attachment of goods belonging to the insolvent estate is mentioned. "To make the same" must mean to make the attachment of the things, and in the way prescribed. It is possible that the offence might be committed before the messenger came to the place where the goods were at all; but when he seized the man's goods it is a different question. Then it is said that the clause would be useless. That is a matter for the Legislature to consider; we are not sitting here to legislate. I quite agree with Mr. Justice *Hargrave* that in making this Act the Legislature only intended to deal with property belonging to insolvent estates. Can it be said that every one's property is to be liable to be seized at any time, on the plea that the messenger believes that it belongs to an insolvent. Then, as to the effect of this decision, I think that the law of contempt will still strike people who offend in this way. They can be proceeded against by attachment, or, it may be, by some other proceeding. I do not at all approve of the course that has been pursued here by the defendant, and I see the danger of people setting up unfounded claims to the property of insolvents. But in this case we must assume that the defence set up was an honest and valid one, and I think that it ought to have been left to the jury.

Conviction quashed. (*n*)

Attorney for the defendant—*P. J. Hourigan.*

(*n*) On a subsequent day the *Chief Justice* referred to *Re Insolvency of Crawford*, Stephen's Notes of Cases, p. 144, decided by the Supreme Court in 1846. It was there held that by ss. 21 and 22 of the Insolvency Act the messenger might seize, at his peril, even the property of third parties; and that s. 75 provided punishment for interference with him.

THE QUEEN *v.* THOMAS DUNCAN, JOHN DUNCAN, AND FRANK RILEY. (*a*)

Crown case—Practice—Nolle prosequi as to one prisoner.

Where the Attorney-General enters a *nolle prosequi* as to one of several prisoners jointly indicted, the Judge who presides at the trial is not bound to strike out the name of that prisoner wherever it appears in the information.

The following was the case stated for the opinion of the Court under the Act 13 Vic., No. 8.

"When the prisoners were called upon in the dock for trial, no one answered for Frank Riley, and the Attorney-General applied for leave to enter a *nolle prosequi* against him, which I accordingly recorded in the margin of the information as follows:—'On application of Attorney-General *nolle prosequi* entered as to Frank Riley.' After the jury were duly sworn to try the prisoners Thomas and John Duncan, Mr. *Buchanan* requested me to alter the information by striking out the words 'Frank Riley,' wherever they occurred throughout the body of the information, which I declined to do. The only question is whether I was right in so doing.

"JOHN F. HARGRAVE."

No counsel appeared for the prisoners.

Windeyer, A.-G., who appeared for the Crown, was not called upon.

PER CURIAM. (*b*) There is nothing in the point.

Conviction sustained.

THE QUEEN *v.* JONES. (*a*)

Criminal law—Wounding with intent to commit murder—Admissibility of evidence of wife of prisoner.

In one count of an information the prisoner was charged with feloniously and unlawfully wounding one M. A. J. with intent then feloniously, wilfully, and of malice aforethought, to commit murder. *Held*, that the count was good without alleging an intent to murder any particular person. *Regina* v. *Ryan* followed.

In the third count the prisoner was charged with feloniously and unlawfully wounding one M. A. J. with intent then to inflict grievous bodily harm on M. J. M. J. was the wife of the prisoner. M. J. was tendered by the Crown as a witness, and *Hargrave*, J., admitted her evidence. *Held* (*per* HARGRAVE and FAUCETT, JJ.; Sir JAMES MARTIN, C.J., *dissentiente*), that the evidence was rightly admitted.

This case was tried before *Hargrave*, J., at the last Circuit Court at Albury. The information contained three counts:—1. Shooting at Mary Ann Jones with intent to commit murder:

(*a*) June 8. (*b*) Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.

(*a*) June 8.

2. Wounding Mary Ann Jones with intent to do her some grievous bodily harm. 3. Wounding Mary Ann Jones with intent to do some grievous bodily harm to one Mary Jones (*b*). Mary Jones was the wife of the prisoner. At the trial her evidence was tendered and objected to, but admitted by the learned Judge. After the admission of the evidence the third count was abandoned by counsel for the Crown. Two questions were reserved for the consideration of the Court:—1. Whether the first count of the information was good; 2. Whether the evidence of the prisoner's wife was rightly admitted.

Coutts (for the prisoner) relies on the second point only. There is no charge of injury to the wife in this information. All the cases in which the evidence of a wife has been admitted are where there has been a charge of personal violence to her or where there has been an abduction. As to the first point, *Reg.* v. *Ryan* (*c*), on which the other side will rely, is doubted by Mr. *Greaves* in *Russell on Crimes* (*d*). [FAUCETT, J.: With respect to the first point, a case, *Regina* v. *Ebel*, was tried before me at Albury on the 11th April, 1872, in which the information charged that the prisoner "feloniously and unlawfully did cause to be taken by A. B. a large quantity, to wit two grains, of a certain deadly poison called strychnine, with intent thereby then feloniously, wilfully, and of his malice aforethought, to commit murder." The prisoner was convicted and sentenced to death, but his sentence was afterwards commuted.] *Reg.* v. *Lallement* (*e*) was referred to.

Salomons (for the Crown). The first point is perfectly good. The statute 1 Vic., c. 85, was passed to meet the difficulty raised in *Reg.* v. *Holt* (*f*). *Reg.* v. *Ryan* (*g*) is a direct authority in favour of that count. The principle of the admissibility of the evidence of a wife was first laid down in *Rex* v. *Audley* (*h*). There the wife's evidence was received against the husband, though he inflicted no bodily injury upon her. [FAUCETT, J.: There actual violence was perpetrated on the wife in the presence of the prisoner.] The rule is stated in *Taylor on Evidence* to be that the wife may testify against her husband on an indictment . . . for any offence against her liberty or person. We submit that an act done with the intention of injuring the wife is a crime against "her liberty or person." Besides, in this case, though it is not mentioned in the information, there was evidence that the

(*b*) The Act 1 Vic., c. 85, s. 4, provides for the case of feloniously wounding any person with intent to do grievous bodily harm to *such person*, but there is no statute under which the third count of the information could be supported. No question, however, as to its goodness was raised in the argument. (*c*) 5 M. & Rob. 213. (*d*) p. 936. (*e*) 1 Cox. C.C. 204. (*f*) 7 C. & P. 518. (*g*) 5 M. & Rob. 213. (*h*) 1 St. Tr. 387.

wife was struck, though not wounded. [HARGRAVE, J.: This point cannot turn upon what the evidence was; it must turn upon the form of the information.] It is admitted that there were other witnesses who proved the offence.

Sir JAMES MARTIN, C.J. This case is not exactly like any of those to which we have been referred during the course of the argument, and is in some respects novel. As to the first point, the case of *Regina* v. *Ryan* is a sufficient authority in favour of the first count. Expressions of eminent text-writers have been cited, but we cannot regard those expressions in the face of that decision by two Judges of very high authority, Mr. Baron *Parke*, and Mr. Baron *Alderson*. The first objection to the conviction is therefore invalid. Then it is contended that the evidence of the wife of the prisoner ought not to have been admitted at all. To decide this question we must look at the information. It is in three counts. The first charges the prisoner with wounding Mary Ann Jones (his daughter) with intent to commit murder; the second with wounding Mary Ann Jones with intent to do her grievous bodily harm; and the third with wounding Mary Ann Jones with intent to do grievous bodily harm to Mary Jones (the prisoner's wife). The evidence of the prisoner's wife was tendered on behalf of the Crown, and an objection taken to its admissibility was overruled by the learned Judge on the ground that the name of Mary Jones was mentioned in the third count. As to the admissibility of the wife to give evidence in criminal cases, the principle is this, that in all cases of personal violence to the wife she may be called as a witness against her husband. The third count, even supposing it to be a good one, does not allege personal violence to the prisoner's wife. An intention to do her grievous bodily harm is alleged, but it does not appear from the information that that intent was in any degree accomplished. I do not think that the principle can be extended so far as to make a wife's evidence admissible where there is nothing but a bare intention to do her an injury. The case of *Rex* v. *Jagger* (*i*) seems to me to carry the principle to its utmost limit. There the prisoner had attempted to poison his wife by giving her a cake containing arsenic. No injury was done to the wife, but she was admitted as a witness, upon the ground of the necessity of the case. Mr. Justice *Holroyd* put his decision upon the ground that the facts could not be proved by any other witness. Here it appears that there was no such necessity, for the act complained of took place in the presence of several witnesses. As the ground of necessity did not arise, and as no personal violence to the wife was charged, I think the allegation of intent in the third count

(*i*) 1 East. P.C. 445.

was not sufficient to make the evidence admissible. I also think the evidence was not admissible under the first count. Under that count it was open to the Crown to prove a wounding of Mary Ann Jones with the intent of murdering some third person (who might be neither the wife nor the daughter), and yet the wife might be called as a witness where no injury upon her had been inflicted, or even contemplated by the prisoner. I therefore think, though the point is a novel one, and not free from difficulty, that the evidence was wrongly admitted, and that the conviction should be set aside.

HARGRAVE, J. I quite concur with his Honor the *Chief Justice* in thinking that the first count is clearly good. With reference to the second ground, that the evidence of the wife was wrongly admitted, I quite agree that, as a general rule of law, the evidence of wives or husbands is not admissible against each other. That rule, so far as it goes, is general and irreversible. And the law is equally clear that in a criminal case, when evidence is tendered and objected to, we can only look at the information to decide the question of its admissibility. The evidence was not admissible under the first count, but I admitted it under the third. Why I did so was because in the days when all the cases were decided about the admission of such evidence, none of the statutes existed which we have now, distinguishing *the intents* with which a criminal act is done. Formerly there was no question of intent; now, under the modern statutes, the intent is a part, and an essential part, of the offence charged. I therefore thought that the old principle of the admissibility of the evidence of a wife, in cases where she was the victim of personal violence, applied equally to the new cases which have arisen since, where *the intent* was against the wife. I extended the rule of law from cases of personal injury to attempts to commit personal injury. I still think that I was quite right in admitting the evidence, and that the conviction should be sustained.

FAUCETT, J. On the first point I agree with their Honors. As to the other point, it appears that the evidence of the prisoner's wife was admitted under the third count. It is quite clear that if it was admissible under any of the counts, whether afterwards abandoned or not, it cannot now be objected to. Was it admissible under the third count? Is that count good? It seems to me that it only particularises the first count? Under the first count the prisoner might be convicted of wounding Mary Ann Jones with intent to murder some other person; if so, what difference could it make that an intent to murder some particular person was alleged? The third count alleges wounding

Mary Ann Jones with intent to murder Mary Jones (*j*), and it is virtually included in the first count which charges wounding Mary Ann Jones with intent to commit murder generally. I am under the impression that the third count is good, though it is unnecessary to decide the point, for the count had not been abandoned at the time the evidence was tendered and was not objected to then. Nor has any point been reserved with reference to that count. Now the question whether the evidence of the prisoner's wife was admissible against him under that count comes as close as possible to the decisions we have already. And it is clearly not necessary that there should be an actual injury inflicted on the wife in order to make her testimony admissible. In a case of assault she would be a competent witness; yet in an assault there need be no blow—no touching of her body. It is sufficient to constitute an assault in law that a person makes an attempt to strike another person within striking distance, or under such circumstances as that he would have it in his power to inflict a blow. It is not the intent to strike that is the offence; it is doing an act with the intent that makes the assault. It seems to me that on this principle the evidence was admissible. Here there is an act charged to have been done with intent to injure the wife; just as an assault upon the wife is an act done with intent to injure her. The cases are exactly parallel, and I cannot see why, if the evidence is admissible in the one case, it is not in the other. On the whole, I am of opinion that the evidence was rightly admitted, and that the conviction should be upheld.

Conviction upheld.

Attorney for the prisoner—*Curtis and Gannon.*

EX PARTE SHOVELLER. (*a*)

Prohibition—11 *Vic., No.* 33, *s.* 13.—*Drawing petition for Sequestration of Insolvent Estate*—38 *Vic., No.* 1.

It is not an offence within the Stat. 11 Vic., No. 33, s. 13, for a person not a barrister, attorney, or conveyancer, to draw a petition for the sequestration of an estate as insolvent with the accompanying affidavit and schedule.

The petition for sequestration is not a proceeding in the Supreme Court.

A "proceeding at law" in the statute means a proceeding in the Supreme Court.

The applicant was convicted by certain Justices of the Peace, sitting in Petty Sessions at Grafton, of preparing a certain proceeding at law in contravention of the Attorneys' Act, 11 Vic.

(*j*) His Honor subsequently stated that he was under a misconception as to the terms of the third count (*see above*). His Honor then stated that the third count charged the intent "to do grievous bodily harm to one Mary Jones," and that the latter part of his judgment was applicable to the count in these terms.

(*a*) June 12.

No. 33, s. 13, and was fined £20 and 14s. 4d. costs. On the 5th June *Salomons* obtained a rule *nisi* for a prohibition on the ground that the act charged in the information, that is, drawing or preparing a petition for the sequestration of an estate as insolvent, together with an affidavit in support of such petition, and a schedule of assets and liabilities thereto annexed, is not within the Attorneys' Act, 11 Vic., No. 33, s. 13.

Salomons now moved to make the rule absolute. This Act, being penal, should be strictly construed: *Woolley* v. *Kay* (*b*); *Coe* v. *Lawrance* (*c*). In *Ex parte Simpson* (*d*) the Court held that this Act did not apply to proceedings in the District Court. The Insolvent Court is no more a part of the Supreme Court than the District Court. Besides, the petition is not a "proceeding at law" until it is filed. Drafting it before it is filed is no offence. [Sir JAMES MARTIN, C.J.: Does not the 25 Vic., No. 8, give the Insolvent Court a separate jurisdiction?] It has been the practice for years for persons who are not professional men to prepare these petitions and schedules. No one ever supposed before that it was a breach of the law.

Butler, Q.C., for one of the respondents. The Act is not restricted to proceedings in the Supreme Court. The petition is a proceeding at law, inasmuch as it is a proceeding under the Act 5 Vic., No. 17. Even if the effect of the Act 25 Vic., No. 8, was to give a separate jurisdiction to the Insolvency Court, that would not affect this question. Still, assuming that it does, the Act 38 Vic., No. 1, restores the Insolvent Court to its position as a branch of the Supreme Court. The Act makes the Insolvent Court a "superior Court of Record of law and equity." Does not that make proceedings in it proceedings at law?

Sir JAMES MARTIN, C.J. In this case the applicant was summarily fined for an alleged breach of the Act 11 Vic., No. 33, which prohibits any person other than a barrister, attorney, or conveyancer, from preparing any proceeding at law or in equity for any pecuniary consideration. The proceeding in respect of which the charge was brought was a petition to the Chief Commissioner of Insolvent Estates for the sequestration of an estate as insolvent with the usual schedule annexed. The question for the consideration of the Court is whether this petition was a "proceeding at law or in equity" within the meaning of the Act. I am of opinion that it was not. It seems to me that the only proceedings to which the Act applies are proceedings in the Supreme Court, because by the Act the preparation of these proceedings is declared to be a contempt of the Supreme Court. I do not see how an interference with proceedings in another Court,

(*b*) 1 H. & N. 339. (*c*) 1 E. & B. 516. (*d*) 12 S.C.R. 286.

could be a contempt of the Supreme Court. It is clear to my mind that the Legislature intended the Act to apply only to proceedings in the Supreme Court. The fact that two modes of procedure are provided does not make any difference. The offence —the contempt—is the same, but it is punishable in two ways—either by a summary application to the Court, or by a complaint before Magistrates. The question is whether the petition for sequestration is a proceeding in this Court. If the law had remained as it was after the passing of the Act 5 Vic., No. 17, there could have been no doubt about it, because all the proceedings in insolvency were taken to the Supreme Court. But in 1861 it was thought expedient to create a new jurisdiction in insolvency, and by the Act 25 Vic., No. 8, the Chief Commissioner of Insolvent Estates was given all the powers of a Judge of a Court of Record, and the powers of the Supreme Court or a Judge thereof were transferred to and vested in him. An appeal was given to the Supreme Court, but a distinction was drawn between the Chief Commissioner sitting in insolvency and the Supreme Court. A petition, therefore, became under this Act, not a proceeding in the Supreme Court, but a proceeding in the Court of Record, presided over by the Chief Commissioner. Another Act was passed in 1874. The first section is not well drawn; indeed, it is one of the worst I have ever seen in any Act. I find it exceedingly difficult to know what the Legislature meant: the distinction between the Insolvent Court and the Supreme Court seems to be maintained, and yet, from some of the expressions, it is difficult to say that the Legislature did not intend to restore the same state of things as existed before the passing of the Act 25 Vic., No. 8. But as it is by no means clear to my mind that this last Act restores the insolvency jurisdiction to the Supreme Court, and as it is quite clear that the Act 25 Vic., No. 8, took it away, I am of opinion that the allegation that this was a proceeding at law was not sufficiently made out, and that the prohibition ought to go.

HARGRAVE, J. With regard to the construction of the term "proceeding at law or in equity," I think that when the Act 11 Vic., No. 33, was passed, it applied to all proceedings under the Act 5 Vic., No. 17. That Act created the insolvency jurisdiction of the Supreme Court, which is a jurisdiction both at law and in equity, and this jurisdiction was in existence at the time of the passing of the Attorneys' Act. But in the case of *Ex parte Simpson* we seem to have decided that the Attorneys' Act does not refer to the jurisdiction of the District Courts, created, as it was, by a statute passed subsequently. I think the subsequent legislation has taken proceedings in the insolvency jurisdiction out of the operation of this 13th section.

FAUCETT, J. I am of the same opinion. The question is whether the proceeding complained of here is one that would be a contempt of the Supreme Court. Under the old law there is no doubt at all that a petition for sequestration would have been a proceeding in the Supreme Court. Now the Insolvency Court is just as independent of the Supreme Court as the District Court is. The last Act, in which the Insolvency Court is called "a superior Court of Record of law and equity," is relied upon. What that expression means I confess I cannot understand, and the construction of that Act is too doubtful to sustain a criminal charge.

Rule absolute, without costs.

Attorney for applicant—*A. H. McCulloch.*
Attorneys for respondent O'Meagher—*Pigott and Trickett.*

LYONS *v.* SAMUEL. (*a*)

Pleading—Insolvency Acts—Delivery of a Promissory Note partly for goods then supplied, and partly for an antecedent debt— 5 *Vic., No.* 17, *s.* 8.

To a declaration by the official assignee of an insolvent estate containing counts framed under sections 6 and 8 of the Insolvent Act, in respect of a promissory note for £150 10s. 9d delivered by the insolvents to the defendant, it was pleaded that the insolvents paid with the said promissory note for certain goods then sold and delivered to them by the defendant to the value of £42, and also a then previously owing debt of £75 17s. 6d., and the defendant also at the same time gave in cash to the insolvents the balance of the money represented by the said promissory note, and that the plaintiff had never offered to repay to the defendant the difference or balance between the said sum of £75 17s. 6d. and the full amount of the promissory note.

Held, a bad plea.

Wilson v. *Cobcroft* and *Levy* v. *Smith* followed.

DECLARATION by plaintiff as official assignee of the insolvent estate of T. F. Meyer and Co. 1. An alienation by the insolvents, being then actually insolvent, to the defendant without valuable consideration of a promissory note made by Myers and Solomon in favour of the insolvents for the sum of £150 10s. 9d. 2. An alienation of the same promissory note without valuable consideration, such alienation having the effect of making the insolvents insolvent. 3. An alienation by the insolvents, being then insolvent, of the promissory note, having the effect of preferring the defendant to their other creditors. 4. An alienation

(*a*) June 14.

by the insolvents, being then in contemplation of surrendering their estate, of the promissory note to the defendant, having the effect of preferring the defendant to their other creditors.

PLEAS. 8. That the promissory note, in the 1st, 2nd, 3rd, and 4th counts mentioned, was a promissory note for the sum of £150 10s. 9d., and before the alleged alienation, transfer, &c., in the said counts respectively mentioned, the insolvent Solomon Meyer was justly indebted to the defendant in a sum of £75 17s. 6d. for goods sold and delivered by the defendant to the said Solomon Meyer, and at the time of the said alienation, &c., the said Solomon Meyer purchased goods from the defendant to the further amount of £42, which were then sold and delivered to the said Solomon Meyer by the defendant, and the said insolvent did then and there pay for the said goods lastly sold and delivered, and also the then previously owing debt of £75 17s. 6d. with the said promissory note, and the defendant also at the same time gave in cash to the said insolvent the balance of the money represented by the said promissory note, and the plaintiff has never offered to repay to the defendant the difference or balance between the said sum of £75 17s. 6d. and the full amount of the said promissory note.

There were replications and a rejoinder, both of which were demurred to, but the view taken by the Court makes it unnecessary to mention them. It appeared from the subsequent pleadings that the declaration contained a count for money had and received, and that the defendant paid into Court under that count the sum of £75 17s. 6d., being the amount of the past debt.

Butler, Q.C. (*Knox* with him), appeared for the plaintiff; *Darley* (Sir *G. Innes* with him), for the defendant.

Darley objected that *Butler* could not argue that the plea was bad. The plaintiff had demurred to the rejoinder and the defendant had joined in demurrer. The plaintiff could not now go back to the plea when the defendant had come prepared to support the rejoinder.

Butler referred to the Common Law Procedure Act. The Court must look at all the pleadings, and if a prior pleading was bad, no attention need be paid to the subsequent pleadings. The goodness or badness of the plea must be open to argument.

PER CURIAM. In strictness Mr. *Darley's* contention is right. At the same time it is usual and proper for the Court, in case any of the prior pleadings should seem open to question, to call upon counsel to argue the point, though the pleading might not have been demurred to.

Butler. The plea here admits the averments in the declaration that the promissory note was transferred by the insolvents to

the defendant at a time when they were actually insolvent or were contemplating insolvency, that the plaintiff had demanded the note, and that the defendant had refused to give it up and to pay the value thereof or any part thereof. Then it sets up upon these admissions that the note was given in part for goods supplied and money advanced at the time, and in part for a past debt. This Court has held over and over again that a preferential security given in part for a past debt is bad altogether. *Wilson* v. *Cobcroft* (*b*) was the first case. That is referred to and followed in *Levy* v. *Smith* (*c*). There part of the consideration was a fresh advance [Sir JAMES MARTIN, C.J.: Are not the English decisions on this point to the opposite effect?] The judgment in *Humphery* v. *McMullen* (*d*) points out the distinction between our law and the English law on the question of preference. There the preference must be fraudulent, or, at any rate, voluntary; here it is sufficient that the payment should "have the effect of preferring." The intention of the parties is of no consequence; the only question is, what is the effect of the transaction. The English Bankruptcy Act of 1869, ss. 6 and 95, shew that a preference under that Act must be fraudulent. *Humphery* v. *McMullen* also decides that the transfer of a promissory note or cheque is not a *payment* within the protection of 25 Vic., No. 8, ss. 1, 2. The only case that the other side can possibly rely on is *Humphery* v. *McMinn* (*e*). That was not a case of alienation at all, but of bailment, and is so treated in the judgments. The cheque was there given to the defendant to get cashed, and he paid himself out of the proceeds, but he never was the owner of the cheque. That can have no application to this case. *Morris* v. *Flower* (*f*) is another case in point. It has been decided that if part of the consideration for a bill is illegal, even if there is good consideration also, the whole bill is void: *Scott* v. *Gillmore* (*g*). The consideration for a security of that kind is indivisible.

Darley. By the plea we do not justify the retention of the £75 17s. 6d. for the pre-existing debt; we justify the retention of the promissory note. We say as to that note, we are holders for value in respect of goods and money advanced, and are entitled to hold it until you offer to pay us that amount. We do not claim for the pre-existing debt; although we say that is a just debt, still the payment for it cannot be supported under the insolvent law. The gist of the plea is that the plaintiff never offered to pay the defendant the balance. *Levy* v. *Smith* is a different case; it was there sought to hold the note, not only for the fresh advance, but also for the past debt. That came within *Wilson* v. *Cobcroft*;

(*b*) December 14, 1859. (*c*) 4 S.C.R. 329. (*d*) 7 S.C.R. 96. (*e*) 8 S.C.R. 231. (*f*) 2 S.C.R. 196. (*g*) 3 Taunt. 226.

this does not. Suppose the note had been given as security for the goods and money advanced and there had been no pre-existing debt: the assignee could not have recovered the note without paying us the amount of our claim. What difference does it make that there was a pre-existing debt too? [Sir JAMES MARTIN, C.J.: That is not your plea; you allege the transfer of the promissory note to be a payment of the whole, including the pre-existing debt.] It might have been more apt to have stated that the note was given as security for the goods sold and moneys advanced. [FAUCETT, J.: Suppose in the case of a bill of sale it was alleged in a plea that the bill of sale was a security for a fresh advance as well as an old debt, and that the defendant did not claim for the whole debt: would that plea have been good?] There is a distinction between bills of sale and promissory notes; the one changes the property in the goods themselves, the other only represents money; and if we get the money and pay back to the assignee what was given us for a pre-existing debt, is not that all we are bound to do? [HARGRAVE, J.: Is not your contention this: so far as this transaction had the effect of preferring, you submit to the former decisions of the Court, but no further?] That is exactly what I am contending for. *Hill* v. *Farnell* (*h*) and *Baxter* v. *Pritchard* (*i*) shew that the assignee cannot recover without tendering us the amount we are *bona fide* entitled to In *Scott* v. *Gillmore* part of the consideration was illegal from the very first; here there is nothing illegal in taking a security for a past debt until insolvency supervenes. I would ask the Court to reconsider *Wilson* v. *Cobcroft*, if necessary. *Sempill* v. *Vindin* (*j*) was also referred to.

Butler, in reply, was not called upon.

Sir JAMES MARTIN, C.J. This case cannot be distinguished from *Wilson* v. *Cobcroft*. That decision, although it has been thought that the law ought to be altered, still remains established law, and it is clearly recognised in *Levy* v. *Smith*. In that case, while Levy held the promissory note only by way of deposit, section 8 of the Insolvency Act did not apply, but as soon as there was a final indorsement to him for three considerations, of which one was the pre-existing debt, the transfer was void under that section. That is exactly the case here, but the transfer took place at a different stage; there was not a deposit followed by a transfer, but a transfer in the first instance. The plea admits the transfer for several considerations, one of which was a past debt—the very thing that was held void in *Levy* v. *Smith*. I think, therefore, that that case is a direct authority.

(*h*) 9 B. & C. 45. (*i*) 1 A. & E. 456. (*j*) 7 S.C.R. 374.

HARGRAVE, J. I concur altogether with his Honor. No doubt it seems a great injustice that the defendant should lose the full value of his goods and money sold and advanced, because he put in the amount of a pre-existing debt as part of the consideration; but the reason for the law probably is this, that in a trading community when persons take anything in payment but cash or cheques, they should take it *cum onere*. It is better for the purposes of trade and commerce that persons who take securities should hold them subject, in case of insolvency, to give up their advantage, and to come in and prove with the other creditors. From *Wilson* v. *Cobcroft* downwards the law has been settled, and we cannot now disturb it.

FAUCETT, J. It seems to me, that if there is a hardship in this case, the same hardship runs through all the other cases. In *Wilson* v. *Cobcroft* and *Levy* v. *Smith* there was the same hardship. I feel it impossible to distinguish this case from the others in principle. Finding a number of cases in this Court following the same principle, I think that when the law is known, the injustice and hardship both cease, as people will be careful not to take a single security for both past debts and present advances.

Judgment for the plaintiff.

Leave to amend within ten days.

Attorneys for plaintiff—*Want, Johnson & Want.*
Attorney for defendant—*J. Shepherd.*

LOCKHART *v.* DYMOCK. (*a*)

District Court Appeal—Statute of Frauds, s. 17*—District Court Rules* 1861 *and* 5*—Memorandum in Writing.*

The following agreement was signed by the defendant:—"Tenterfield, 25th March, 1875. I, the undersigned, do agree to deliver at the kiln to Mr. W. S. Lockhart [the plaintiff] thirty thousand good hard bricks at the rate of 30s. per thousand, the said bricks to be delivered in four months from this date." The District Court Judge nonsuited the plaintiff on the ground *inter alia* that the document mentioned above was not an agreement in writing within the Statute of Frauds.

On appeal, *held*, that the nonsuit was wrong.

Appeal from the Northern District Court holden at Tenterfield. The following case was stated for the opinion of the Court.

"This is an action brought to recover damages on breach of agreement, and no notice of special defence was filed. The

(*a*) June 15.

defendant entered into a written agreement with the plaintiff to supply him with 30,000 bricks in the following words:—

"'Tenterfield, 25th March, 1875.

"'I, the undersigned, do agree to deliver at the kiln to Mr. W. S. Lockhart (30,000) thirty thousand good hard bricks at the rate of (30s.) thirty shillings per thousand. The said bricks to be delivered in four months from this date.

"'Signed—Walter Dymock × his mark.

"'Witness—G. A. Augustein.'

"There was also a receipt for money paid on account as follows at the foot of the said agreement:—

"'Received from W. S. Lockhart, the sum of twenty-four pounds (£24) on account of bricks to be delivered.

"'Walter Dymock × his mark.

"'Witness—G. Augustein.'

"By the evidence of the plaintiff it appeared that defendant did not, as a matter of fact, within the specified time, supply any bricks, nor, so far as the evidence went, did it appear that the plaintiff went to the specified place for the said bricks. That subsequently the price of bricks advanced 10s. per thousand. With reference to the receipt for £24, the evidence disclosed that this amount was not paid in cash, but the defendant owed this amount for goods supplied to him some time previously by plaintiff, and that a receipt for the said sum of £24, signed by the defendant, was written at the foot of the agreement which was put in evidence.

"His Honor nonsuited the plaintiff, holding that by the Statute of Frauds there ought to have been a contract in writing, or part payment on delivery of part of the bricks, and that the document produced was not an agreement.

"The question for the opinion of the Court is whether his Honor was right in allowing the Statute of Frauds to operate when the defendant fails to give notice of such defence; and, secondly, whether this was a case within the Statute of Frauds; and, thirdly, whether the document put in evidence was or was not binding on the defendant.

"Agreed to by us this 22nd day of February, 1877.

"Nathan J. Simmons, plaintiff's attorney.

"W. C. Melville, defendant's attorney.

"Approved, F. W. MEYMOTT."

Salomons (for the appellant) cited *Sempill* v. *Cumming* (*b*) and *Walker* v. *Massey* (*c*).

The respondent did not appear.

(*b*) 9 S.C.R. 128. (*c*) 16 M. & W. 302.

Sir JAMES MARTIN, C.J. I am at a loss to understand on what ground Judge *Meymott* held that the agreement was not an agreement within the Statute of Frauds. I think he was altogether in error. The nonsuit must be set aside. It is not necessary to express an opinion on the other points.

FAUCETT, J. I am of the same opinion. It would be satisfactory sometimes to have the reasons on which the decisions of District Court Judges are based stated in the appeal case. We are called upon to state our reasons when there is an appeal from this Court, and I think those Judges should do the same.

Sir W. MANNING, J. I concur with the other members of the Court in their judgment, but I do not think myself bound to confine myself to one point. I cannot see a shadow of reason for any of the grounds on which the Judge nonsuited the plaintiff. I think that there was a good part payment, if it were necessary. As to the necessity for notice of the defence of the Statute of Frauds, there is no question that notice ought to have been given.

Nonsuit set aside. Judgment reversed and new trial ordered. Defendant to pay costs of this appeal.

Attorney for appellant—*Nathan J. Simmons.*

THE QUEEN *v.* BURNS AND MACK. (*a*)

Criminal law—Admissibility of statements made in prisoner's hearing—Res gestæ.

Statements made in a prisoner's hearing are admissible in evidence against him although the witness could not see the prisoner and had no opportunity of observing his demeanour.

Whether such statements are admissible as part of the *res gestæ* where they do not tend to explain the acts done—*Quære.*

The following case was stated for the opinion of the Court under the Act 13 Vic., No. 8 :—

"These two prisoners were tried before me at the recent Darlinghurst Sittings and found guilty of a rape upon the person of Charlotte Matthews at Sydney on the 7th day of April last.

"During the trial the girl and her mother both described the three-roomed cottage in which the offence was committed, and it appeared that at 2 o'clock in the night the girl was in the small back room and the mother in the front room and two children in the upper room. The girl swore that she awoke by the screams of the children in the upper room, and saw the prisoner Burns

(*a*) June 15.

holding a match in one hand and an open clasp knife in the other hand, which he shut and put in his pocket, and then blew out the match and perpetrated the rape, the other prisoner holding the girl's arms.

"Each of these witnesses swore that the words used by the children were: 'Willie Burns is in the room, &c., &c.,' and the only question for the Court is whether I ought to have allowed these words to be stated by these witnesses as heard by them, because the other evidence proved that both the prisoners were equally within hearing of the words as the witnesses themselves.

"I annex copies of the evidence of these two witnesses.

"The mother swore that she also was awoke by the screams of the children, and afterwards saw Burns and another man behind the door in her room, when she turned them out of the house.

"JOHN F. HARGRAVE."

The detailed evidence is not material.

O'Connor, for the prisoners. It is not sufficient that statements should be made in the prisoner's hearing to make them admissible. Such statements are admitted on the ground that, coupled with the conduct of the prisoner at the time, they may amount to an admission by him; but they go for nothing unless the witness was present and had an opportunity of observing the demeanour of the prisoner. The statements in question were clearly inadmissible as part of the *res gestæ*, for they were in no way explanatory of the acts constituting the offence. The only effect of admitting the evidence was to put before the jury at second-hand the statements of the children, whom it was inexpedient to call as witnesses and examine upon oath. He cited the following authorities and cases:—*Phillips on Evidence* (*b*); *Taylor on Evidence* (*c*); *Russell on Crimes* (*d*); *Reg.* v. *Smythies* (*e*); *Reg.* v. *Bartlett* (*f*); *Reg.* v. *Walsh* (*g*); *Neile* v. *Jakle* (*h*); *Hyde* v. *Palmer* (*i*); *Reg.* v. *Petcherini* (*j*).

Windeyer, A.-G., was not called upon.

Sir JAMES MARTIN, C.J. In this case the prosecutrix at the time the crime was committed was residing in a house with her mother, step-brothers, and sister. There were three rooms in the house, two downstairs, and one upstairs. The children were sleeping upstairs; the mother and daughter in different rooms downstairs. Evidence was given by the prosecutrix that she heard the children cry out the name of one of the prisoners, and the mother also gave evidence, that she heard the children sing out that Willie Burns was in the room with them

(*b*) Vol. I. 334, 405; 10th Ed. (*c*) Vol. I. 719, 720; 6th Ed. (*d*) Vol. III, 247, 424, 4th Ed. (*e*) 5 C. & P. 332. (*f*) 7 C. & P. 832. (*g*) 3 F. & F. 275. (*h*) 2 C & K. 709. (*i*) 32 L.J.Q.B 126. (*j*) 7 Cox C.C. 79.

and was holding an open knife over them. An objection was taken to the admissibility of this evidence on the ground that it did not appear that the prosecutrix was in the same room with Burns when this was said, and consequently that she could not have observed his demeanour at the time. If there had been no evidence that the prisoner was in the house at all, this evidence would have been clearly inadmissible. The evidence of his being there is the evidence of the girl herself. Immediately after the screams of the children upstairs she heard a match struck and saw Burns in the room. There is proof by the prosecutrix that this man was in the house. It appears to me that, although it may not be the case that Burns was standing over the witness at the very time that she heard the screams, yet that he was in the house. She awoke hearing cries, and found a man standing over her. That is surely sufficient evidence that what was said by the children was said in the hearing of the prisoner. Why the evidence was pressed I cannot say; it could have no possible effect, and without other evidence of identity it was clearly inadmissible; with other evidence, it was clearly unnecessary. The rule as to the admissibility of evidence of this kind is clearly stated in *Taylor on Evidence* (*k*). No general rule can be laid down as to the value of statements made in the prisoner's hearing; they are sometimes of very small value indeed, and ought to be altogether disregarded by a jury; still they are clearly *admissible*, whatever their value. Upon the question whether these statements were admissible as part of the *res gestæ* I am disposed to agree with Mr. *O'Connor*, that they were in no way explanatory of what was done, and ought not to have been admitted on that ground.

HARGRAVE, J. I have nothing to add to what the *Chief Justice* has said upon the first point. It is settled law that anything said in the hearing of the prisoner is clearly admissible in evidence. The question of admissibility does not turn at all on the fact whether the witness can or cannot see the demeanour of the prisoner—that is decided by the case of *Neile* v. *Jakle*, cited in the argument. I also think the evidence was clearly admissible as part of the *res gestæ*, on the principle of *Lord George Gordon's case* (*l*), where exclamations by the mob were given in evidence as part of the transaction. That case has never been questioned, and similar evidence is constantly admitted on the same ground. I may mention that I told the jury not to pay much attention to these children's statements.

Sir W. MANNING, J. I concur in the judgment, but I do so with much doubt. I believe Mr. *O'Connor* has rightly stated the principle on which this kind of evidence is admitted, viz., on the

(*k*) 748; 3rd Ed. (*l*) 21 St. Tr. 535.

ground of its being an implied admission by the prisoner, and not merely because it is said in the prisoner's presence or hearing. It seems to follow that unless the witness can speak to the prisoner's hearing at the time, no admission can be implied from his conduct. Still the general evidence in the case is such that I am not disposed to dissent from the other members of the Bench. Abundant evidence of identity was given independently. At the same time, I think the evidence was not altogether immaterial. I have been influenced in my decision also by the fact to which Mr. Justice *Hargrave* has alluded, that he cut down the effect of this evidence in his summing up to the jury. I certainly think that the admission of this evidence as part of the *res gestæ* would be carrying the principle which governs that class of evidence much too far. (*m*)

Conviction sustained.

IN RE C. W. BEDWELL. (*a*)

Costs of making Judge's order a Rule of Court—Payment before rule obtained—9th Supreme Court Rule of the 28th February, 1856.

Where a Judge's order for the payment of certain costs was, upon a motion made in ignorance that the costs had been paid, made a rule of Court with costs, the Court, though the expenses of obtaining the rule had been incurred before the money was paid, rescinded the rule.

Where the money ordered by the Judge to be paid is paid at any moment before the rule is obtained, there has not been a disobedience of the order within the meaning of the 9th Supreme Court Rule of the 28th February, 1856.

On the 15th May Sir *W. Manning*, J., ordered one Struve to pay certain taxed costs and also the costs of obtaining the order, when taxed, to C. W. Bedwell. The costs of the application were taxed on the 1st June, and on the 9th June Mr. Sly, Bedwell's attorney, made a formal demand of the amount payable under the order from Mr. Curtiss, the town agent of Struve's attorney. Struve and his attorney were both resident at Tamworth. On the 5th June Mr. Curtiss had written and informed Mr. Newman, Struve's attorney, of the amount to be paid, but the letter only reached Tamworth on the 8th. When Mr. Sly made the demand on the 9th June (which was a Saturday), Mr. Curtiss informed him that he expected the money on the following Monday or

(*m*) *Windeyer*, A.-G., said that the Court had not called upon him on the second point. There were some late cases which pushed the principle of *res gestæ* very far.

(*a*) June 22.

Tuesday, and asked him not to take any further steps at present. On the following Monday, the 11th June, Mr. Sly drew and filed an affidavit of service and disobedience of the order, and delivered a brief to counsel to move the next day to make the order of Sir *W. Manning*, J., a rule of Court. The next morning a remittance arriving from Tamworth, Mr. Curtiss sent down his cheque to Mr. Sly's office about half-past ten. A clerk in the office gave a receipt for the cheque. Mr. Sly was away from the office at the time, and counsel, in ignorance that the money had been paid, moved for and obtained an order making the order of Sir *W. Manning*, J., a rule of Court with costs.

The 9th Supreme Court Rule (*b*) is in the following terms:— When a Judge's order is made a rule of Court, such rule shall be drawn up with costs to be paid by the party against whom it is made, if an affidavit be filed that the order was served on such party or his attorney and has been disobeyed.

Cohen now moved upon affidavits setting forth the above facts to make absolute a rule *nisi* obtained to shew cause why the order making the Judge's order a rule of Court should not be rescinded or varied by striking out so much of it as directed the costs of the rule to be paid by Struve. Mr. Sly had been guilty of undue haste. Bedwell might be entitled of right to have the Judge's order made a rule of Court, but if these circumstances had been before the Court in the first instance, Struve would not have been ordered to pay the costs.

Darley shews cause. The English rule is in precisely the same terms as our rule 9. *Thompson* v. *Billing* (*c*) shews what is the meaning of the words "has been disobeyed." Here there had been disobedience, whatever was done afterwards, and we were entitled to obtain the rule. The moment there has been a demand upon the town agent, and that demand has not been complied with, we have a right to our costs. Besides, the principal expenses of the rule were legitimately incurred on the 11th, before the payment, and the Court will not deprive us of those costs; otherwise a party might refuse to pay until all the expenses of moving for a rule had been incurred, and then tender the money in Court at the last moment.

Sir JAMES MARTIN, C.J. The case cited by Mr. *Darley* shews that an order may be made a rule of Court after a demand from the town agent only, but does not apply to the case where there has been an actual payment before the rule has been moved for. I am of opinion that, inasmuch as the money, the payment of which was sought to be enforced, had actually been paid, there were no legal grounds for making this order a rule of

(*b*) S.C. Pract. p. 23. (*c*) 2 Dowl. N.S. 824.

Court. Of course, where a party wishes to enforce a Judge's order, necessary expenses must be incurred, at any moment during the progress of which payment may be made. There is a certain hardship if the party cannot recover the expenses so necessarily and legitimately incurred as costs. But I cannot see any principle to justify an application for a rule of Court when the money has been paid. I think, therefore, that this motion should be granted, but, out of consideration for the hardship involved, without costs.

HARGRAVE, J. I differ from the *Chief Justice* only on the question of costs. Mr. Curtiss was clearly in the right all through, and Mr. Sly was wrong in moving on Tuesday after having been told that the money was expected on that day. He ought to have waited until the next motion day, and as he did not he made the application at his own risk. Then he ought to have retained the cheque when it was sent to him and not have claimed the costs of the rule. I think, therefore, that he ought to pay the costs of this application.

Sir W. MANNING, J. I am quite of opinion that the rule ought to be set aside. Instead of the order having been disobeyed, the payment was a distinct act of obedience. I see by the affidavit, upon which the order was made a rule of Court, that the demand was on the 9th instant. That was on Saturday, and on the Monday, two days afterwards, steps are taken to obtain the rule of Court. To say the least of it, that was a very prompt proceeding; and I do not regret that the attorney will not get the costs either of the application for the rule or of this application. Where only two days were allowed to intervene, I think the proceeding was altogether too prompt to be encouraged. No doubt they thought Struve would not pay unless compelled, and they took their chance that the money would not be paid by the Tuesday. The order must be set aside, and it is with considerable hesitation that I concur with the *Chief Justice* in not making the respondent pay the costs of this application.

Rule absolute to rescind the rule of 11*th of June—without costs.*

Attorneys for applicant—*Teale and Curtiss.*

Attorneys for respondent—*Spain and Sly.*

EX PARTE BROUGHTON. (a)

District Courts Act, s. 5—Residence of defendant—Prohibition—Delay in application.

B. was the owner of M. Station in the G. district, and visited it every year for two or three months at shearing time. In the winter of 1875 he went there, and remained till the winter of 1876, but left a month before certain trespasses, for which he was sued in the District Court at G., were committed, and had not since returned. His son was living at the station and managing it for him. B. had lived for 34 years, and was still living, with his wife and family, at Sydney. The plaint in the District Court at G. came on for hearing on the 1st of February, when B. objected to the jurisdiction on the ground that he was resident in Sydney, and not at M. The District Court Judge held that he had jurisdiction, but adjourned the case till the next sittings on the 19th of June, to enable B. to apply to the Supreme Court. On the 11th of June B. obtained a rule *nisi* for a prohibition returnable on the 19th, and on that day it came on for argument.

Held (*per* HARGRAVE and FAUCETT, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that B. was "resident" within the G. district for the purposes of the District Courts Act of 1858, s. 5.

Held, also (*dissentiente*, Sir JAMES MARTIN, C.J.), that the application for a prohibition under these circumstances ought to have been made within a reasonable time, and that B. was precluded by his delay in making the application.

Bennett moved to make absolute a rule *nisi* for a prohibition directed to the District Court Judge of the South Western District Court to restrain him from proceeding in the matter of a plaint, *Lloyd* v. *Broughton*, filed in the District Court holden at Gundagai. The rule *nisi* was granted on the 11th instant.

It appeared from the affidavits that the applicant, the defendant in the District Court, had been living for many years with his wife and family at Sydney. He had stations, of which Muttama, near Gundagai, was one, and used to visit them from time to time. For some years he had been in the habit of spending two or three months in each year at shearing time at Muttama Station, the purpose of his visits being to look after the management of the station. One of his sons had resided there permanently as manager for some years, and had been succeeded by another, who acted in the same capacity. From June, 1875, to August, 1876, the applicant resided continuously at the station. In August he left, and had ever since lived in Sydney. Certain trespasses on the plaintiff's land by the defendant's sheep and cattle were alleged to have been committed during a period succeeding the 20th of September, 1876. An action was brought for these trespasses in the District Court at Gundagai (Muttama being situate

(a) June 19.

in that district), and the defendant duly received notice of the action. The cause came on for trial on the 1st of February. The defendant did not appear, but filed an affidavit objecting to the jurisdiction on the ground of non-residence. Affidavits in answer were filed by the plaintiff, and the Judge decided in favour of his jurisdiction, but as he had some doubt, adjourned the case to the next sittings of the Court, which were to take place on the 19th of June, in order that the parties might take the opinion of the Supreme Court. No steps were taken by the defendant till the 11th of June, when a rule *nisi* for a prohibition was granted returnable on the 19th.

Bennett cited *Ex parte McEvoy* (*b*); *Turner* v. *Nicholson* (*c*); *Ex parte Pollard* (*d*); *Ex parte Moore* (*e*); *Kerr* v. *Haynes* (*f*); *Wellington* v. *Whitchurch* (*g*). Delay is of no consequence; prohibition will go as long as there is anything to prohibit (*h*).

Salomons for the plaintiff in the Court below: *Ex parte McEvoy* decides that a person may have several residences. So, although the defendant resides in Sydney, he may also reside at Muttama. That case is a decision on the exact point against the defendant. *Bailey* v. *Bryant* (*i*) is also in point. [Sir JAMES MARTIN, C.J.: That case was departed from in *Butler* v. *Ablewhite* (*j*), and must be taken to be overruled by *Kerr* v. *Haynes*, decided in the following year.] If the Court were to hold against the jurisdiction in this case the plaintiff would be left practically without remedy. He could not recover costs in the Supreme Court unless the damages amounted to £30, and he could not sue in the District Court unless he came to Sydney. He also cited *McDougall* v. *Paterson* (*k*).

Sir JAMES MARTIN, C.J. In this case an action of trespass was brought against the applicant in the District Court of Gundagai. In the particulars the trespasses are stated to have been committed between the 20th September, 1876, and the date of the plaint. The applicant objected to the jurisdiction of the District Court on the ground that he was not resident within the Gundagai District, and made an affidavit in which there is the following statement:—"I now reside with my wife and family at Bradley, Glenmore Road, Sydney, and have so resided for the last thirty-four years, and have not during the whole of that time resided anywhere else, beyond paying visits to my different stations." He also states that he was at Muttama Station from the month of June, 1875, to the month of August, 1876, one month before the

(*b*) 7 S.C.R. 145. (*c*) 1 S.C.R. 171 n. (*d*) 2 S.C.R. 192. (*e*) December 23, 1870; *Sydney Morning Herald*. (*f*) 29 L.J.Q.B. 70. (*g*) 32 L.J.M.C. 189. (*h*) Fitzherbert Nat. Brev. 46 a. (*i*) 28 L.J.Q.B. 86. (*j*) 28 L.J.C.P. 292. (*k*) 11 C.B. 7.

cause of action sued upon arose, that he then left the station, and has ever since lived at his home in Sydney. I am clearly of opinion that, under these circumstances, the District Court had no jurisdiction, and I think the case of *Ex parte Moore*, decided by this Court in 1870, is a clear authority in favour of that view. There a person who had a station near Hay, but who lived at Narellan, was sued in the District Court at Hay for the cost of a dam constructed on his station. He had been in the habit of visiting his station for about a month in each year. The Court held that he was not resident within the Hay district. Whether a man is temporarily residing at his station for two months or twelve months can make no difference—it comes back to the question, what is his actual residence? and I am of opinion that it is where he habitually and permanently lives with his wife and family. This is expressly decided in one English case—*Kerr* v. *Haynes*. There it was held that a law stationer, carrying on business in London and occupying rooms there, passing three or four days in each week there, was yet residing at Margate, where he occupied a house with his wife and family. There is no difference between that case and the present. It has several times been decided that a person may have more than one residence, but the question is, at which of his different residences does he actually reside. The word "dwell" in the English decisions seems to me exactly the same as the word "reside." The case of *Bailey* v. *Bryant* was relied upon by Mr. *Salomons;* but that case was expressly overruled by two later cases, one of which is *Kerr* v. *Haynes*, to which I have referred, and the other *Butler* v. *Ablewhite*, decided in the same year as *Bailey* v. *Bryant*. Mr. Justice *Crowder* delivered a very full judgment. He says, at p. 293, referring to the decision of the Court of Queen's Bench in *Bailey* v. *Bryant*:—"We regret to say that after the fullest consideration, and with the greatest deference and respect for the opinion of the Court of Queen's Bench, we find ourselves compelled to arrive at a different conclusion." And again, at p. 294:—"In the present case, although the plaintiff had a dwelling-house in Grosvenor Square, he had also a dwelling-house in Warwickshire, and actually resided there with his family when the action was brought. It was admitted in the argument that the plaintiff's residence in Warwickshire and in London at different periods of the year was of the same character and about the same duration. It is plain, therefore, that he 'dwelt' at both places, with this difference only, *that his actual residence at the time of action brought was in Warwickshire*. And we think that in such a case it is impossible to avoid coming to the conclusion that the plaintiff 'dwelt' in Warwickshire, and so more than twenty miles from the defendant at the time of action brought." That is to say, the

question is, not how many residences a man has, but at which of them he actually dwells. So here Mr. Broughton may have two residences, one in Sydney, and the other at Muttama Station, but the question for us is at which of them he was in fact residing at the time the action was brought. And this construction of the word "resident" is borne out by the proviso in section 6. That enacts that if any party *having in one place become liable* for any damages recoverable in any District Court, shall, by removal, become resident within the jurisdiction of any other such Court, the plaintiff may sue him in the Court holden for the district within the jurisdiction of which such liability for damages arose. That proviso would be unnecessary if a person could be actually residing at two places at the same time. But it clearly does not apply to the defendant here, for he did not become liable in damages until he had removed from the district.

Against the view I have taken, and in favour of the defendant's liability, we have been referred to *Ex parte McEvoy*. I do not think that case bears the construction put upon it, or that it is fully reported. I remember that the decision was much commented upon at the time, and remarks were made that Mr. McEvoy, having had the benefit of selections under the Land Act by declarations that he was a resident, had then tried to turn round and say that he was not resident. To the best of my recollection, the whole case turned on that point. He was held to have put himself out of Court by his own declarations. But there is nothing in that case, even as reported, which militates against what I have said. Inasmuch as Mr. Broughton had left the district before the cause of action arose, I think the District Court had no jurisdiction, even if we were bound to hold, in accordance with *Ex parte McEvoy*, that he was resident at the station up to that time. If he could be sued in the District Court for trespasses committed a month after he left, he might equally be sued for a cause of action arising a year afterwards.

I can see no hardship in this case, even if we were at liberty to go into the question of hardship. There is nothing to prevent the plaintiff from suing in the Supreme Court, and under the circumstances he would probably be entitled to his costs.

As to the other point taken for the plaintiff, that the defendant was too late in making this application, I think there is nothing in it. The few words of Sir *Alfred Stephen* in *Turner* v. *Nicholson*, to which we have been referred, do not seem to me to bear the construction put upon them. But even if they did, they apply only to a case where a prohibition was asked for after judgment. The present application is made while the proceeding

is still going on, and before judgment has been given. On all these grounds, I think that the rule for a prohibition should be made absolute.

HARGRAVE, J. With reference to the delay that has taken place, and which was not mentioned by Mr. *Bennett* when he moved for the rule *nisi*, I think that the universal rule, which holds in all proceedings, and is not confined to equity, viz., that a person seeking relief must come within a reasonable time, applies here. The delay would be a sufficient ground to my mind for refusing the prohibition. Besides, I should also be inclined to refuse it on the ground that there had been a concealment, in not stating to the Court, upon the application being made, that this delay had occurred. It is a general rule that, when a rule *nisi* is obtained *ex parte*, any omission to state all the material facts to the Court is fatal when the rule comes on to be made absolute. But, upon the merits of the application, it is clear that the District Court had jurisdiction in this case. This is not a question of *domicile*—of course a man cannot have two domiciles; but it is equally clear law, as clear as daylight, that he may, for the purpose of being sued for contracts and torts, and in respect of the ordinary transactions of life, have any number of residences. If a man has a house in Sydney, and stations in the country, I think the law is that he resides for the purpose of local transactions at these stations, and that law is so settled as to be incapable of being questioned or limited. It is necessary for the transaction of business all over the colony that this should be so. If I have a station, and my overseers reside there, and manage my property for me, and occupy for me, their residence is, in law, my residence. Besides, the facts appearing by the affidavits clearly shew a personal residence by Mr. Broughton. He goes to the station for all the purposes that require his presence. Though he does not live there all the year round, he lives there so long as there is anything for him to do there. The very object of establishing District Courts at different places in the colony, as we may see from the Act itself, was to enable persons to be sued upon the spot in respect of all local transactions. Of course, if a man lives in Sydney, and his business is in Sydney, and he merely goes to stay for some time with a friend in the country, then he ought not to be sued there, but in Sydney, where his residence and his business are; but it is altogether different when he has his own property there, and goes there for the purposes of his own business. A plaintiff has the right to say: "Your land is here; the trespass was committed here by your sheep and cattle, and I will sue you here." I do not think that Mr. Broughton could be sued at Gundagai for debts contracted

in Sydney; but I think he has a residence there for all purposes connected with carrying on his station. All the English cases that have been referred to turn on special circumstances of their own, and are no authorities in the present instance. The rule ought therefore to be discharged.

FAUCETT, J. I am of opinion that delay in these cases is very important, and that, where a party lies by, the Court ought not to interfere. Here the defendant had an opportunity of coming to this Court months ago, and yet he does not make his application until it may have the effect of putting off the proceedings in the District Court for another six months. I think the plaintiff ought not to be put in that position. It seems to me that Mr. *Salomons'* contention is a right one, and that where the objection to the jurisdiction is a personal matter, as in this case, the question of delay becomes important. A person who only objects, and takes no steps to put a stop to the proceedings within a reasonable time, ought to be taken to have submitted to the jurisdiction. No doubt, in those cases where there is a question whether the inferior Court has jurisdiction over the subject-matter, it is a different question. There delay is of no consequence. I am quite content to rest my decision on the ground that the defendant here was guilty of unreasonable delay in applying to the Court. I am also satisfied that there was a concealment of material facts, though I am sure it was accidental and unintentional.

But the other question is more important. It seems to me that *Ex parte McEvoy* was a very proper decision, and that it settles that a man may, for the purposes of the District Courts Act, have two residences. Our cases differ from the English cases, as our Act differs from the English Act, and the circumstances of this colony differ from the state of things in England. But even the English decisions are very contradictory. We have been referred to several cases which are quite inconsistent with each other. It is very difficult to reconcile them or to understand the distinction drawn. The only way in which, as it seems to me, the principle of the English cases can be explained, is that they followed to a great extent the decisions on questions of "settlement" of paupers. But considering the difference in the circumstances and the difference in the Act, those cases ought not to overrule or control the cases decided on the point in our own Court.

Now, what are the facts here? The defendant had a house in Sydney, where his wife and family lived, and had different stations all about the country, and used to divide his time among all these different places. He was frequently at this station for months at a time, and once resided continuously for twelve

months. These circumstances make this case altogether different from *Ex parte Moore*. There the defendant was only at his station for a month—a mere isolated visit. If the argument of Mr. *Bennett* is correct, it must go this length, that while Mr. Broughton was actually at the station he could not have been sued in the District Court, because his real residence was in Sydney. An utter injustice would be committed—there can be no doubt of that—but we have to see whether such is the law. One difficulty has occurred to me. The acts of trespass complained of took place a month after Mr. Broughton left the station for Sydney. Now the proviso in the 6th section would seem to shew that if a person goes away from a district he cannot be sued in that district unless the cause of action arose before his removal; and that is my difficulty. But the answer is this—that the defendant never really left the district, never ceased to reside there. His sons, his business, his house, his property were still there, and they were still his. The proviso only applies to a person who leaves the district altogether; not to one who goes away, still keeping his property situated there. Then a further difficulty is suggested: that an action might be brought against Mr. Broughton in Gundagai for a debt contracted somewhere else. It may be that he may be liable to be sued there; if so, that is the fault of the Act. But it is a thing not at all likely to arise. The natural thing is to sue a person where the contract was made. It appears to me that this defendant was brought within the jurisdiction of the District Court. The trespasses were committed on land adjoining his station by his cattle or sheep, which were under the control and management of persons in his service. He was clearly liable to be sued somewhere for those trespasses; and, whether the Act requires a permanent or merely a temporary residence, I think he was a resident in the Gundagai district within the meaning of the Act, and that he was properly sued in the Gundagai District Court.

Rule discharged without costs.

Attorneys for plaintiff—*McCarthy, Robertson, and Fisher.*
Attorney for defendant—*H. C. Colyer.*

JOHNSON AND ANOTHER *v.* POOLE AND OTHERS. (*a*)

Practice—Absent Defendants Act (4 *Vic., No.* 6)*—Judgment signed after attachment dissolved.*

Plaintiffs issued a writ against the defendants, who were merchants in Melbourne. The writ was endorsed by the Sheriff's officer as required by the Act 18 Vic., No. 6, and after proceedings in accordance with the Absent Defendants Act, a writ of attachment was obtained against moneys in Sydney alleged to belong to the defendants. Upon the return to the writ of attachment, it appeared that the moneys had ceased to belong to the defendants, and the Judge refused to make an order. The plaintiffs, without service of the writ or any of the proceedings upon the defendants, proceeded in the action and signed final judgment for want of a plea. Upon motion of the defendants in Chambers, *Hargrave*, J., set aside all proceedings in the action with costs. On the motion for a rule *nisi* to set aside the order of *Hargrave*, J.,

Held, that the Judge was right, and rule refused.

Held, also, that it is essential to the validity of proceedings taken under the Absent Defendants Act that the defendants should be entitled to or interested in property or debts in the colony of New South Wales.

Darley moved for a rule *nisi* to set aside an order of *Hargrave*, J., in Chambers, made under the following circumstances:—The plaintiffs, stock and station agents in Sydney, issued a writ of summons in the ordinary form, describing the defendants as of Sydney. In fact they were merchants, living and carrying on business in Melbourne. The sheriff's officer endorsed the writ to the effect required by the Act 18 Vic., No. 6, that he had made search for the defendants and had been unable to find them. The affidavit required by the Absent Defendants Act, s. 2, was then filed by the plaintiffs; and a writ of foreign attachment was issued at their instance and served upon Messrs. Stephen and Stephen, solicitors, as garnishees; and notice of the writ was published in Sydney and Melbourne, as required by s. 4 of the Act. On the return of the writ it appeared from the affidavits filed by the garnishees that the moneys in their hands had ceased to belong to the defendants after the issue of the writ, and no order was made. The plaintiffs then, without any further notice to the defendants, went on as if the writ of summons had been served in due course, filed a declaration, and signed final judgment. They took out a memorial of such judgment, and applied to the Supreme Court of Victoria to issue execution upon the memorial. That Court, on the representation by the defendants that the judgment had been irregularly obtained in New South Wales, ordered the application to stand over, to allow the defendants to

(*a*) June 29.

apply to the Supreme Court of New South Wales to set aside the judgment. The defendants accordingly made an application in Chambers, and *Hargrave*, J., ordered the judgment and all proceedings in the action to be set aside with costs.

Darley. The principal objection to these proceedings was that they ought to have been taken under s. 16 of the Common Law Procedure Act, and that the plaintiffs ought in the first instance to have issued a writ for service out of the jurisdiction. [FAUCETT, J.: That would appear to me to have been the proper course to pursue.] Now, it was intimated in the *Brisbane Oyster Fishery Co.* v. *Emerson* (*b*) that a colonial Legislature had no power to pass that section, and proceedings under it would have been liable to the same objection in Victoria as was taken here in that case. But, at any rate, we have a right to go under the Absent Defendants Act. The 18 Vic., No. 6, provides that the Absent Defendants Act shall not be affected by the Common Law Procedure Act. If his Honor's judgment is right, the Absent Defendants Act is entirely gone. That Act was passed as a substitute for proceedings in outlawry. (*c*) It is applicable to persons who were never resident in the colony: s. 24. [FAUCETT, J.: According to my experience, that Act has been greatly abused. Sir JAMES MARTIN, C.J.: It is capable of very great abuse.] Those are questions for the Legislature; this Court must take the Act as it stands. We proceeded regularly under ss. 10 and 11 of the Act. [Sir JAMES MARTIN, C.J.: I do not see anything in the Act as to going on to judgment except for the purposes of foreign attachment. You say you are entitled to use this Act for purposes for which it was never intended.] The Act does not regulate how you are to proceed to judgment. The general law regulates that. [Sir JAMES MARTIN, C.J.: Under the general law of this Court a return of *non est inventus* does not authorise a judgment to be signed *ex parte*.] But the Act impliedly authorises it. If the defendants have property here, or if the cause of action arose here, the action can be proceeded with in the way prescribed by the Act. [Sir JAMES MARTIN, C.J.: I am disposed to think that if the attachment is set aside there is an end of the proceeding altogether. The very thing that gave you any ground for taking these steps is cut from under you, and yet you want to go on. It is altogether an abuse of the Act.] But the cause of action arose in this colony. The attachment was only set aside because the defendants had nothing here to attach. [FAUCETT, J.: Unless there is property here belonging to the defendants, there is no foundation for the proceedings at all. If a material element, for want of which the proceeding could not be

(*b*) *Ante*, p. 80. (*c*) *Stephen's Practice*, p. 99.

commenced, fails during its course, must not the proceeding go with it?] I submit the Act has not that effect. [Sir JAMES MARTIN, C.J.: What section in the Act gives you power to sign final judgment on *non est inventus*?] No section gives that power expressly; but by s. 4 notice in the newspapers is substituted for service on the defendants. Section 8 enables the plaintiff to proceed as if the defendant resided in Sydney and had appeared to the action. [FAUCETT, J.: Yes; but that section must be read with reference to the previous sections.] The previous sections have been complied with; when the action was commenced there was property to be attached. This decision has taken the profession by surprise. The view I am putting forward has been constantly acted on and has never been contested. The Act was intended to give a remedy against any debtors residing out of the colony. It is not restricted to the case of debtors owning property here, though it supplies a machinery for making any property they may have here liable to their debts. There can be no practical hardship, because defendants can come in and defend at any time within three years, and also because the cause of action must have arisen in the colony. Here there is no question that the merits are all with the plaintiffs, and that the defendants, though not served, had full notice throughout of the proceedings that were being taken.

Sir JAMES MARTIN, C.J. It appears that in this action the plaintiffs issued a writ of summons in the ordinary form against the defendants, and having issued the writ and taken certain proceedings prescribed by the Absent Defendants Act, obtained a writ of foreign attachment under that Act, with a view to attach moneys of the defendants in the hands of Messrs. Stephen and Stephen, as garnishees. For that purpose it was necessary that it should appear by affidavit that the cause of action arose in the colony; also that to the best of the deponent's belief the defendants did not reside within the colony; and further that the defendants were "to the best of the deponent's belief possessed of or entitled to, or otherwise beneficially interested in, lands, moneys, securities for money, chattels, or other property in the custody or under the control of some person or persons in the said colony, or that such person or persons was or were indebted to such defendants." When this had been complied with, the process issued. It is plain then that the object of that process is, where a person, though not resident in this colony, has property here, to enable his creditors to get at that property. By s. 3 a Judge is empowered to issue a writ of foreign attachment, and it is provided that final judgment shall in no case be signed in any such action (that is, any action in which all these

steps have been taken) until an entry shall have been made on the record of the issue of such writ of attachment, and that, if it appears that the cause of action did not arise in this colony, the attachment shall forthwith be dissolved. It appears, then, that all the steps prescribed are essential preliminaries to the signing of final judgment in the action. Here the attachment was dissolved; not because the cause of action did not arise in the colony, but because the moneys in the hands of the garnishees had ceased to belong to the defendants. At any rate, the attachment was gone. Now, it is contended that, although the attachment is gone, the final judgment signed afterwards still remains, and may be enforced against the defendants in Melbourne. I think such a use of the judgment would be an abuse of the process of this Court. If it could be used for that purpose, it would be open to any person, merely by making a false statement that the defendant had property in this colony, to go on, obtain final judgment against the defendant, and that judgment could be made the foundation of proceedings against the defendant in all civilised countries, though he never had any notice of the process. The Legislature never intended this Act to extend to any persons resident out of the colony, unless they had property in the colony; and it follows that, as soon as it is shewn that they have no property here, all the proceedings are necessarily at an end. I think, though on different grounds from those on which his Honor appears to have decided in Chambers, that his Honor's decision was right, and that it is our duty to refuse this rule.

HARGRAVE, J. I concur.

FAUCETT, J. I am entirely of the same opinion. I think a mistake has been made in applying the procedure under the Absent Defendants Act to this case. One might as well leave out the statement required to be inserted in the affidavit, that the cause of action arose within the colony, as leave out the statement that the defendant had property in the colony. If there is no property, then there is no ground for issuing the writ of foreign attachment. And if the attachment cannot go, there can be no final judgment, for an entry of the writ must be made on the record before signing final judgment. I think all the averments in the affidavit prescribed by the Act are essential, and it turns out that one of those averments is untrue. Either the defendants had no property here at all, or it ceased to be theirs before the issue of the writ of attachment. Suppose the case were that all these steps were taken in the belief that the defendants were out of the jurisdiction, whereas they were really resident in some remote part of the colony. Suppose, in ignorance of this fact, judgment was signed; when the fact appeared, would not the proceedings be set aside?

And why should not this be done, if it turns out that the defendants had not, as was believed, any property in the colony? It seems to me that the proceeding was against common justice and an abuse of the Act.

Rule refused.

Attorneys for plaintiffs—*Want, Johnson, and Want.*

SEVIL *v.* HEATH. (*a*)

Practice—Signature of Rules of Court by Chief Clerk—Supreme Court Rules 3 *and* 5, *of* 1*st March*, 1856.

It is a sufficient compliance with Rule 5 of the 1st of March, 1856, if a Rule of Court is signed by the chief clerk "for the Prothonotary."

Butler, Q.C., and *Rogers* moved to make absolute a rule *nisi* to set aside an order of *Hargrave*, J., in Chambers.

Salomons took the preliminary objection that the rule *nisi* was not signed by the Prothonotary in accordance with the 5th Supreme Court Rule of the 1st of March, 1856. (*b*).

The rule was signed—"By the Court. J. A. Read, for the Prothonotary;" Mr. Read being the chief clerk. Mr. Slattery, the Prothonotary, reported to the Court that it had been for many years the practice of the chief clerk to sign for the Prothonotary.

PER CURIAM (*c*). This is not an Act to be performed by the Prothonotary, where he is intrusted with a personal duty requiring the exercise of discretion. It is a mere ministerial act, done for the purpose of issuing an order, made, not by him, but by this Court. There is no doubt that if Mr. Read had signed in his own name, the rule *nisi* would have been of no effect, but as he signs "for the Prothonotary," there is no irregularity.

Objection overruled.

(*a*) June 30. (*b*) *Supreme Court Practice*, p. 34. (*c*) HARGRAVE, FAUCETT, and Sir W. MANNING, JJ.

BRAY *v.* TAYLER AND OTHERS. (*a*)

Powers of District Court Judge trying Supreme Court Issue—22 Vic., No. 18, s. 98—Absent Defendants Act (4 Vic., No. 6).

A District Court Judge trying an issue in the Supreme Court sent down to the District Court under a Judge's order, has power to find a verdict under the Absent Defendants Act, s. 19, against one of several defendants jointly sued. If the verdict be found for the plaintiff against one defendant simply, the Supreme Court can amend the judgment signed upon such verdict by entering judgment for the other defendants.

Motion for a rule *nisi* for a new trial. This action was originally brought in the Supreme Court, but was, upon the order of Sir *W. Manning*, J., removed for trial into the Metropolitan District Court. It came on for trial before *James Sheen Dowling*, Esq., District Court Judge. At the trial an objection was taken that there had been a misjoinder of defendants. The Judge's notes state what took place as follows:—"Mr. *Simpson* applied to have all the defendants' names struck out except that of Dr. Tayler. Mr. *Pilcher* contended that the Court had no such power, and cited some English decisions on the point. Mr. *Simpson* replied: He eventually withdrew his application to amend, but relied upon the Absent Defendants Act, authorising the Court to find a verdict against the defendant Tayler alone. Mr. *Pilcher* argued that this Act did not assist the plaintiff. The Judge intimated that he was of opinion then that that Act did apply, and that, if he thought that the plaintiff was entitled to recover against Tayler alone, he would find a verdict against him alone. Eventually the Judge found a verdict for the plaintiff for the sum of £31 as damages against the defendant Tayler alone, he being of opinion that he could do so under the Absent Defendants Act, and cited the case of *Rennison* v. *Walker* (*b*)." The Registrar certified to the Prothonotary in accordance with the Judge's verdict, and judgment was signed for the plaintiff against the defendant Tayler. One of the grounds taken in the memorandum for the rule *nisi* was that the Judge was in error in supposing that he could find a verdict under the Absent Defendants Act, and further that his finding under that Act was erroneous, and could not be sustained.

Pilcher, on behalf of the defendant, moves for the rule *nisi*. It was for a long time doubted in England whether a County Court Judge had power to amend, and the point was only finally settled in *Rennison* v. *Walker*. But this Act, under which the

(*a*) June 30. (*b*) L.R. 7 Ex. 143.

Judge found his verdict, clearly applies throughout to proceedings in the Supreme Court only. The English decision went upon the words "or other presiding officer," which are not to be found in this statute. Then the Judge did not, as directed by the Act, find a verdict for the other defendants. [Sir W. MANNING, J.: We can enter judgment for them now.] We submit that it is too late.

HARGRAVE, J. I see no grounds for interfering with the verdict.

FAUCETT, J. I am of the same opinion.

Sir W. MANNING, J. I think a Judge of the District Court has exactly the same powers as a Judge of the Supreme Court, when trying a Supreme Court issue; and that, though he has not entered a verdict for the other defendants, we can enter up judgment for them now.

Rule refused. Judgment entered for the other defendants.

Attorney for the defendants—*W. Hellyer.*

THE QUEEN *v.* GEORGE ALLISON. (*a*)

Criminal law—Larceny—Recent possession—Inconsistent statements by prisoner and his wife.

Some stolen property was found in the possession of the prisoner nearly twelve months after it was stolen. The prisoner, and his wife, in his presence, gave inconsistent accounts of their possession of the stolen property. The chairman told the jury that it would be for the jury to consider whether the account given by the prisoner and his wife, taken in connection with the other facts of the case, was a reasonable one or not, and if not, then they might convict the prisoner. The prisoner was convicted.

Held, that the chairman's direction was right.

Case stated for the opinion of the Court by *James Sheen Dowling*, Esq., Chairman of Quarter Sessions for the Metropolitan and Coast District.

"The prisoner was tried at the Quarter Sessions holden in Maitland during the present month [June, 1877], upon an information wherein it was charged that he did on the 29th of July, 1876, break and enter into the dwelling house of one James Tyrrell, and did then and there steal two brooches, one fan, one ring, three silk handkerchiefs, one butter dish, five white handkerchiefs, and one article of wearing apparel, his property." [The evidence was then stated at length. It is sufficient to

(*a*) June 26.

mention that a detective went with a search warrant to the prisoner's house on the 8th of June, 1877, and found there some of the property charged to have been stolen. "The witness asked the prisoner where he got the brooches from? He replied he knew nothing about them; they were his wife's property. The witness asked the prisoner then if he knew where his wife got them? He replied he had never seen them before. The prisoner was then taken to where his wife was. She was then asked by the detective if she could account for them. She replied, in prisoner's presence, that she got them as a present from her husband (meaning the prisoner) on their wedding day. To this the prisoner made no reply. The prisoner was further asked where he got the fan from? He replied that he knew nothing about it, and that it was his wife's property. The witness asked the wife, in the prisoner's presence, where she got it from? She replied that the prisoner bought it for her in Brisbane, but did not say when. To this the prisoner made no reply." The property found in the prisoner's house was identified, and proved to have been stolen in July, 1876.] "In summing up I told the jury that, considering the length of time that had elapsed between the robbery and the finding the things on the prisoner, he could not be called upon to account for his possession, and that if that were the only case against him, I should have directed the jury to acquit. Here, however, he had given an account of his possession, partly by himself, and partly by his wife in his presence, uncontradicted; and it would be for the jury to consider, taken in connection with all the other facts of the case, whether that account was a reasonable one or not; and if not, then they might convict the prisoner. I referred to the case of *Reg.* v. *Metcalfe* (*b*), decided in 1858 by the Full Court on a point reserved. In that case a horse was stolen in December, 1855, and in May, 1858, it was traced to the possession of the prisoner, who gave inconsistent stories as to his possession. The Court held that the prisoner was properly convicted. After the jury had retired, I was referred to the case of *Reg.* v. *Harris* (*c*), reported to have been acted upon by one District Court Judge in this colony. The prisoner was found guilty. Having some doubts as to whether I was right in addressing the jury as above, of my own motion I reserved the question for the consideration of their Honors the Judges of the Supreme Court, viz.—Whether I was right in leaving the case to the jury?"

No counsel appeared, either for the Crown or the prisoner.

PER CURIAM (*d*). We think the direction was perfectly right.

Conviction upheld.

(*b*) *S. M. H.*, Sept. 23, 1858. (*c*) 8 Cox C. C., 333. (*d*) Sir JAMES MARTIN, C.J., HARGRAVE and MANNING, JJ.

McPHERSON *v.* THE BOROUGH OF BATHURST. (*a*)

Municipalities Act, ss. 117, 164—*Liability of Council to repair streets—Negligence.*

An action will lie against a municipal borough, incorporated by the Act 31 Vic., No. 12, at the suit of a person sustaining a serious injury in consequence of the non-repair of streets, of which the council of the borough has "the care, construction, and management," by virtue of s. 117 of the same Act. (*Per* HARGRAVE and Sir W. MANNING, JJ.; Sir JAMES MARTIN, C.J., *dissentiente.*)

DECLARATION. 1. Negligent construction of certain streets, whereby the plaintiff was injured. 2. That before and at the time, &c., the defendants had the care, construction, and management of the said streets in the said first count mentioned, and they so negligently, carelessly, and improperly managed, kept, and continued a certain drain, gutter, or sewer along the side of Durham-street, in the said first count mentioned, and at that part of the said street where it meets and intersects Hope-street, in the said first count mentioned, and were so negligent and careless in and about the repairs, and so improperly neglected to repair the said drain, gutter, or sewer, that such drain, &c., became and was in a condition dangerous and unsafe to persons using and riding along the said streets where the same so, as aforesaid, intersect. That the plaintiff was lawfully using and riding along Durham-street aforesaid, at the same point where the same is so, as aforesaid, intersected by Hope-street aforesaid, when, by reason of such negligence, carelessness, and improper conduct of the defendants in and about the keeping, managing, and continuing the said drain, &c., and such negligence and carelessness of the defendants in and about the repairing, and the improper neglect of the defendants to make and do such necessary repairs of and to the said drain, &c., and not otherwise, the horse on which the plaintiff was riding fell at and in the said drain, &c., and the plaintiff was then, and in consequence thereof, thrown violently to the ground, and his leg was broken. Allegations of special damage.

PLEA. Not guilty.

The action was tried before Sir *James Martin*, C.J., and a jury of four at the May Sittings in Sydney. The learned *Chief Justice* told the jury, with reference to the second count, that no action would lie against the defendants for not repairing the streets within their municipality, but left the first count to them, directing them that if the accident had been caused by the

(*a*) June 26.

improper construction of the streets by the defendants, the plaintiff was entitled to a verdict. The jury returned a verdict for the defendants.

Butler, Q.C., and *Davis* now moved to make absolute a rule *nisi* for a new trial granted on the 4th instant on the ground that the ruling and direction of the learned *Chief Justice* that the plaintiff could not recover on the second count, as the defendants were not bound to repair or to keep in repair, was erroneous. The English cases all apply to a different state of circumstances. In *Russell* v. *The Men of Devon* (*b*), where it was held that action would not lie against the inhabitants of a county or a parish for non-repair of a bridge, the reason of the decision was that the proper remedy was by indictment. In this colony no such indictment will lie. *Young* v. *Davis* (*c*) only decided that such an action would not lie against a surveyor of highways. That went on the principle of *respondeat superior*. The surveyor was treated only as the officer of the parish whose duty it was to repair the roads. In *Whitehouse* v. *Fellows* (*d*) the trustees of a turnpike road were held responsible in an action against them for damage caused to a colliery by the negligent way in which they constructed and kept a drain at the side of the road. In *Parsons* v. *The Vestry of St. Matthew's, Bethnal Green* (*e*), the decision turns on the question whether the Legislature intended, in transferring to the Vestry duties that before belonged to the parish or the surveyor, to give a right of action which could not have been exercised against either the parish or the surveyor. It goes no farther than *Young* v. *Davis*. We rely on *Hartnall* v. *The Ryde Commissioners* (*f*), and *Ohrby* v. *Ryde Commissioners* (*g*). In both those cases an action for a non-feasance was held maintainable. It is said that in those cases the duty imposed was obligatory and not discretionary. We say the words of s. 117 of the Municipalities Act have that effect, when considered with reference to ss. 153 and 164. The latter sections evidently contemplate the repairs of the streets and gutters by the borough, for they give power to impose by-laws and levy rates for that purpose. Power is also given to collect tolls, so that if the rates are deficient, others means may be available for the performance of these duties. In the *Mersey Docks Trustees* v. *Gibbs* (*h*), the House of Lords decided that a public incorporated body, entrusted with the duty of performing certain works, was liable for the mere negligence of their servants. There the declaration alleged that the defendants

(*b*) 2 T. R. 667. (*c*) 7 H. & N. 760; affirmed on appeal, 2 H. & C. 197. (*d*) 10 C. B. N. S. 765. (*e*) L.R. 3 C.P. 56. (*f*) 4 B. & S. 361; 33 L.J. Q.B. 39. (*g*) 5 B. & S. 743; 33 L.J.Q.B. 296. (*h*) L.R. 1 E. & I. App. 93.

negligently suffered a mud bank to remain near the entrance of the Liverpool docks. That decision is directly in point, and has been followed in several later cases.

Salomons shews cause. All the cases are conclusive against the liability of the defendant in this action. They all proceed upon the ground of the inconvenience that would be caused if every individual could bring an action for non-repair of a road, and also upon the argument that no such action having ever been brought before *Russell* v. *The Men of Devon*, it was probable that no action lay. *Young* v. *Davis* does not only shew that a surveyor is not liable because he is the servant of the parish. That is one of the grounds given in the judgment, but not the only one. The same remark applies to *Parsons* v. *The Vestry of St. Matthew's*. *Hartnall* v. *The Ryde Commissioners* is altogether different from this case. There the commissioners were guilty of a misdemeanor if they did not repair. There was, therefore, a statutory duty most unmistakably cast upon them, and any one who was injured by their failure to perform it might maintain an action. *Wilson* v. *The Mayor of Halifax* (*i*) explains that case, and shews that it is quite reconcilable with *Young* v. *Davis*. The words in s. 117 of the Municipalities Act fall far short of the terms even of the English Statutes on which an action has been held not maintainable. They are simply permissive, and ss. 153 and 164 throw no light on the question. In most of the cases in England the bodies sued have had an unlimited power of levying rates. The municipality is limited. It was sworn at the trial that there are over 70 miles of streets within the municipality, and they have no power to raise sufficient funds to repair them. As the Legislature did not give them that power, it could not have been contemplated that they would be under a legal liability for accidents arising from the non-repair. If these actions were permitted, every municipality in the colony would become bankrupt. *McKinnon* v. *Penson* (*j*) and *Gibson* v. *The Mayor of Preston* (*k*) were also cited.

Butler, in reply.

Cur. adv. vult.

Sir JAMES MARTIN, C.J. (*l*). In this case the defendants are a borough incorporated under the Municipalities Act, 31 Vic., No. 12. The action was brought to recover damages for an injury sustained by the plaintiff through the existence in one of the streets within the municipality of a deep hole, into which his horse fell, carrying him with it and breaking his leg. The declaration contained two counts, the first for negligence in constructing the street, the second for negligence in keeping and

(*i*) L.R. 3 Ex. 114. (*j*) 8 Ex. 319. (*k*) L.R. 5 Q.B. 218. (*l*) June 29.

maintaining it. At the trial I told the jury that, under the Act by which the defendants were incorporated, the defendants were not liable for any mere non-feasance; that if they thought fit to construct a sewer, and did that in so negligent a manner as to bring about the accident, they were liable for that misfeasance; but if they constructed the sewer properly in the first instance, and it became defective afterwards, they were not bound to repair it. If the defective state in which the drain was, originated from the effects of the weather, or wear and tear, it having been properly constructed originally, they were not liable. Exception was taken at the time to my ruling, and the question now is whether I was right or wrong in the direction I gave to the jury. No doubt this question raises a point of extreme importance, not only to this borough, but to all the boroughs now or hereafter incorporated under the same Act, viz., whether—whatever may be the state of the municipal funds; whatever the size of the municipality (and some of these municipalities are very extensive); whatever the state of the streets may be when they are handed over; however much it may cost to put them in order;—they are not liable at their peril to put them in a thorough state of repair, and to be sued by every person who may meet with any accident, however slight, through their neglect to repair. A municipality may have, as in this case, streets extending over about 70 miles, and the rates may not return over £1,000 a year, the amount of rates that can be imposed being limited; and yet, if the plaintiff is right in his contention, they are bound, with these limited means, to put the whole of these streets in repair. I can see, if this action is decided against the defendants, that it will require speedy legislation to prevent such bodies from being ruined by actions such as the present.

Many cases have been cited in the argument. I considered them carefully at the time, and I have given much consideration to them since; but it seems to me that no one of those cases is exactly in point, and that we have now to decide this question apart altogether from authority, and entirely on principle. Expressions in some of the cases seem in point at first sight, but, when they are examined, they are found to have no direct bearing upon the particular circumstances of this case, and we have, as I have said, to come to a decision apart from authority.

By the common law, as we all know, counties and parishes in the mother-country were bound to keep their roads and streets in repair. If they did not, they were liable to be indicted for this breach of the common law duty, and though the individuals composing the parish could not be punished, the rates or whatever other county or parish property there was, could be sequestrated

to compel the performance of the duty. An attempt was made a good many years ago to make a county liable to an action for an injury caused to a person by reason of the want of repair of a bridge. That was the case of *Russell* v. *The Men of Devon;* and it was held that no action would lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. Lord *Kenyon* in delivering his judgment said (*m*):—"If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted." And again:—"I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the King were to grant lands to them reserving rent like the grant to the good men of the town of Islington. But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their coporate estate; but if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made. Therefore I think that this experiment ought not to be encouraged; there is no law or reason for supporting the action; and there is a precedent against it in *Brooke;* though even without that authority I should have been of opinion that this action cannot be maintained."

Since that time (1788) attempts have been made to maintain actions by individuals for defects in roads and bridges from which they have sustained injury. By the Highways Act (5 & 6 Wm. IV., c. 50) provision was made for the appointment by the inhabitants of each parish of a surveyor of highways, and the parish was authorised to sue and be sued in the name of the surveyor, and the duties to be discharged at common law by these bodies fell upon the surveyors. Actions were brought in several cases against surveyors of highways to test the question whether a surveyor was liable to an action for the non-repair of roads within his jurisdiction; and it was contended in those cases that the only reason why an action would not lie against parishes was because they could be got at by another process; but, by the appointment of a surveyor, that technical difficulty was removed. The question was elaborately argued in those cases (I refer especially to one—*Young* v. *Davis*), and the result was that the surveyor of highways was held not to be liable to any larger extent than parishes were before the passing of the Act. It was no

(*m*) p. 671.

part of the object of the Act to give a larger remedy to individuals than they possessed before. An action would not have lain against the parish before the Highway Act, and it would not lie against the surveyor after. These conclusions were come to with great hesitation, both in the Court below and in the Court of Exchequer Chamber, on appeal. It was used as an argument in some of the judgments that no instance had occurred of such an action having been brought, and that it was therefore probable that no such action would lie. The principle on which the class of cases to which *Young* v. *Davis* belongs were decided, was that a surveyor was exactly in the same position as the parish; that he stood exactly in their shoes; and that as no action could be maintained against the parish, neither could it be maintained against the surveyor. The question we have now to decide remains untouched by these cases.

We have been referred in the argument to another class of cases, the case of the *Mersey Docks Trustees* v. *Gibbs* being the most important. It was there held that trustees, in whom the Liverpool docks were vested, and who received certain tolls for the use of the docks by the public, were liable for an injury caused to a ship by the mouth of the dock being left in an improper state. One of the points discussed was whether it made any difference that these trustees did not receive the tolls for their own use. But the House of Lords held that it made no difference; that, inasmuch as the tolls were payable by the public, although they had to be expended in the maintenance of the works and did not go into the pockets of the trustees, the public had a right to have the docks kept in a state of repair, and that the trustees, as managers of the docks, were liable to be sued for allowing the docks to get in such dis-repair that persons who paid rates for the use of them suffered damage. This decision was not come to without much argument, and the House of Lords overruled several previous cases. Of course, a decision of the House of Lords is of very great authority, and binds all the Courts in the mother country. The case of the *Mersey Docks Trustees* v. *Gibbs* was elaborately explained in a later case; in fact, the very last on this point—*Winch* v. *The Conservators of the Thames* (*n*). There it was held (in the words of the marginal note):—"That the defendants had power under their statutes to maintain and repair the towing path, for the use of which they were entitled to take a toll; that, according to the decision of the *Mersey Docks* v. *Gibbs*, the intention of the Legislature in such cases is that the corporation shall have the same duties, and its funds shall be subject to the same liabilities, as the general law would impose upon a private person,

(*n*) L.R. 7 C.P. 458.

having and exercising the same rights; and, consequently, that the defendants having provided the towing path under their Acts, have power under such Acts to maintain and repair it, and having invited the public to use it, and taken toll for the use of it, were bound to take reasonable care that it was in a fit condition to be used as a towing path, and that the action was maintainable." The reasons of the judgment will be found at p. 470, where *Bovill*, C.J., after referring to the case of the *Mersey Docks Trustees* v. *Gibbs*, makes the following remarks:—"Upon the true construction of the statutes in this case—construed according to the rule laid down in cited cases—we are of opinion that the defendants had power to repair and maintain the towing path. They had provided that towing path under the Acts of Parliament for the use of the public, they invited the public to use it, they took a toll (as they were authorised to do) for the use of it, and it appears to us, therefore, that they were bound to take reasonable care that the towing path was in a reasonably fit condition to be used as a towing path, and that the present case falls within the principle of the decision in *Mersey Docks* v. *Gibbs*, and the other cases to which we have referred, and must be governed by them;" and on the next page:—"It was further contended that if there was a public right of towing upon the river banks, and the defendants were bound to repair them, the only remedy for the breach of that duty was by indictment; and that no action could be maintained by an individual. But if the duty of keeping the towing paths and banks in repair be imposed upon the defendants, and they have neglected that duty, we are at a loss to understand upon what principle it can be said that a person who has sustained a particular injury from such neglect, and which is not common to the public at large, is precluded from maintaining an action to recover damages for the injury which he has thus individually sustained." Now, so far, that seems an authority in favour of the plaintiff, if a *duty* on the part of the defendants is established in the same sense as in the case of the Mersey Docks Trustees. The expressions there used are large enough to include the principle contended for here. But none of these cases are exact authorities in the present case. There there were public works the use of which depended on the payment of tolls. Some public body had the power of imposing tolls; and those cases only go the length of holding that where an authority has been given by Act of Parliament to establish works of this kind, *and to demand payment for the use of them*, there is a duty cast upon the individuals or corporations so authorised to keep them in a proper state of repair, and a liability incurred if that duty is not performed. The duty and liability both depend essentially on the power to demand payment. Those cases are in no

way different in principle from the case of a shopkeeper who exhibits his wares on his shelves and about his shop, and so invites the public to go in and purchase from him. If he leaves a trap-door unfastened, and one of his customers falls down and breaks his leg, he will be liable in an action for the injury. There is an invitation to the public to go in, and a corresponding duty cast on the person who gives the invitation, not to do anything to endanger the safety of those who came in. That is the principle on which the case of the *Mersey Docks Trustees* v. *Gibbs* was decided, and it leaves this case altogether untouched.

We have now to decide, first, whether a duty is cast upon the defendants to do these repairs? Secondly, if such a duty is cast upon them, are they, being a public body, liable for not carrying out the repairs? As to the second point, there is an absence of direct authority. But there is one case, a decision by Lord *Ellenborough*, the very ablest Judge, in my opinion, who ever sat in Westminster Hall. I refer to the case of *Harris and wife* v. *Baker* (*o*). There the defendants were the trustees of a public road, and were empowered by Act of Parliament to light the road with lamps. The female plaintiff fell over a heap left in the road and broke her arm, through no light being placed there. There were two counts; the first for misfeasance, the second for non-feasance in not placing a light in the highway. The action was tried before Lord *Ellenborough*, who nonsuited the plaintiffs. The case afterwards came before the Court of Queen's Bench on motion to set aside the nonsuit, and Lord *Ellenborough* delivered judgment. He says (*p*):—"It does not appear by the Act of Parliament that this action is maintainable against the trustees. The Act indeed empowers them to cause such number of lamps to be provided as they shall think necessary; but suppose they did not think it necessary to provide any lamps, can it be said that an action would lie against them on that account? If, by omitting to put up lamps where it is necessary, they are guilty of a breach of public duty, they may be indicted for it; but to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going further than any case warrants." Nor is there any case up to this moment that authorises anything of the kind. It was a very short judgment, but, considering the eminence of the Judge who pronounced it, with me it is an authority of the greatest weight. That case has been referred to in later cases, and counsel have sometimes insisted in argument that the effect of subsequent decisions has been to overrule it. That is not so. No Judge has ever gone the length of saying that what is there laid down is not

(*o*) 4 M. & S. 27. (*p*) p. 29.

law. In one of the cases cited on the present argument, *Foreman* v. *The Mayor of Canterbury* (*q*), *Harris* v. *Baker* was referred to, but no attempt was made to overrule it. In the case of *Wilson* v. *The Mayor of Halifax* the point I am now discussing was touched upon by Chief Baron *Kelly*. In delivering the judgment of the Court he says:—"Should a case arise in which the question shall be whether the 68th section of the Public Health Act 1848 imposes upon the local authority the liability to be sued in a civil action for damages by reason of a failure to perform a duty assigned to them by the Act, we should pause before we could hold that, in addition to the well-established remedy by indictment, every individual among the public would have a right of action for any and every injury resulting from such breach of duty. Upon this point, however, as it does not arise in the present case, we pronounce no opinion." He, therefore, does not decide the point, and that case leaves this question exactly where it was before. Now what is the case of *Hartnall* v. *The Ryde Commissioners*, on which the plaintiff's counsel have relied so strongly? In the first place, the facts were very different from the present case, for there the Act of Parliament vesting the streets in the commissioners made the omission to repair a misdemeanor. Still, assuming that the defendants here were in the same position, what does that case shew? Mr. Justice *Crompton* in delivering judgment, after referring to *Young* v. *Davis*, says:—"These enactments take away the liability of the parish to do the repairs, and cast upon the new body a liability to the same extent as that which before lay upon the parish; and, *consequently, a liability for acts of omission to repair.*" And again, at the conclusion of his judgment:—"Under the Towns Improvement Act 1847, s. 49, the commissioners are guilty of a misdemeanor in refusing or neglecting to repair; and, *being so, if a private person suffers damage from the repairs not having been done, they are within the general rule of law, and, unless they can discharge themselves, are liable to an action.*" In these few lines is the whole reasoning, if, with all respect for that learned Judge, it can be called reasoning, by which an entirely new principle was brought into our law. The Courts having held in *Young* v. *Davis* and other cases that parishes and surveyors of highways were not liable for neglect to repair highways, yet, without anything to support it beyond a mere statement of opinion, this new principle of liability for acts of non-feasance was established. Mr. Justice *Blackburn*, the only other Judge who sat in that case, said nothing upon the point now under discussion except that he was of the same opinion. The case of *Hartnall* v. *The Ryde Commissioners*

(*q*) L. R. 6 Q. B. 214.

was referred to in a subsequent action against the same defendants, *Ohrby* v. *The Ryde Commissioners;* and Mr. Justice *Mellor* in delivering the judgment of the Court says:—"We think that under the circumstances we are bound by the decision in this Court in *Hartnall* v. *The Ryde Commissioners*, upon the construction of another section of this very statute. . . . If that authority is to be questioned, it must be in a Court of Error, as we are bound by it and the other authorities referred to in argument." So that a decision, originally come to without any reasoning to support it, was followed in another case in the same Court, the Judges feeling themselves bound by that decision. *Ohrby* v. *The Ryde Commissioners* goes no further than the previous case. But, at the most, these cases only apply where a clear duty is imposed by statute. There a duty was imposed in the most emphatic way. The Legislature said in effect: You must repair the roads, and you will be punished if you do not. I have already stated that I am not satisfied with the reasoning in the case of *Hartnall* v. *The Ryde Commissioners*. We are in the habit of paying respect to the decisions of the Court of Queen's Bench. Considering the learning and eminence of its Judges, and the fact that they administer law on the same principles as ourselves, we generally follow their decisions; but we are not *bound* by them, or by the judgments of any tribunal except the Privy Council. If the reasoning in any particular case does not satisfy us, it is not only in our power, but it is our duty not to follow it, leaving the parties to appeal to the only tribunal whose decisions are binding upon us. I cannot see what difference there can be in the liability of parishes and corporations. Corporations stand on exactly the same footing as parishes. Public interests are equally involved, and the parish and the corporation are equally public bodies. If the reason for making corporations liable was that the public were interested in the repairs being carried out, why could not actions have been maintained against parishes on the same ground?

However, admitting the two last mentioned cases to be authorities, is this case a case of the same kind? The 117th section enacts that "The council shall, within the boundaries of the municipality, have the care, construction, and management of public roads." Now, I cannot see how these words can be regarded as a direction that the council *shall* do these repairs, or be liable to an indictment for a misdemeanor if they do not. The Legislature has not said that the council shall construct or repair these roads. All that is said is that they are to have the care, construction, and management. That is to say, they have all necessary powers with regard to their care, construction, and management. Whatever care is to be exercised over them, they are the persons

to exercise that care. They are the persons to construct them, and whatever is to be done to these roads, they are the persons to do it. I do not think that these words are at all equivalent to a direction that they shall repair, and an intimation that if they do not they shall be punished. Stress has been laid on the proviso in s. 117 as shewing that an onerous duty is laid upon the council, otherwise why should the council object to take charge of the roads mentioned in the proviso? But that comes to no more than this—it is a power given to private persons to hand over roads under certain circumstances, nothing being said about what is to be done with them when they are handed over. By s. 153 the councils are empowered to make by-laws for a variety of purposes, among others, for aligning, paving, and guttering the streets. They have power to make such by-laws and to impose rates for carrying them out, but I fail to see anything in this Act which *compels* them to do anything of the kind. There is nothing to shew that the streets, or culverts, or gutters in any municipality are to be constructed or maintained. I cannot imagine that any owners of property would petition the Government for the establishment of a municipality, if there were such a clause in the Act; particularly in a new country like this, where everything has to be done, and where we have not the accumulated labour of centuries to assist us. It is not likely that the small population of one of our sparsely peopled country towns, with a large area, and perhaps a hundred miles of streets, would care to come under an obligation to keep all these streets in repair. Yet we are asked to put a clause to that effect into the Act, the Legislature not having done so.

But it is contended that it will be sufficient if we hold that there is a more limited duty imposed on these councils—that is, to repair *dangerous* holes into which people are liable to fall and injure themselves seriously. I see no principle on which we can hold anything of the kind. To decide in the way suggested would be to deprive the public of that certain rule of law which as a British Court of justice we ought to lay down, applicable to all cases of the same kind, and not limited in its application by the facts of each particular case, in such a way that every verdict will depend, not on some broad, intelligible principle of law, but on the views of the particular Judge and jury before whom the case is tried. Either there is an obligation to repair or there is not. This action depends, not on some limited duty cast on the defendants, but upon their general obligation to repair. And if there is a general obligation to repair, it involves the consequences that the council must keep all these roads and gutters, whatever their extent, in repair at their peril; and that

the obligation must exist whatever the state of their funds. It seems to me that, the Legislature not having in so many words created any such obligation in this Act, we have no right to assume legislative functions, and do that which the Legislature has left undone. There not being any positive obligation to repair in this case, it appears to me that the case of *Hartnall* v. *The Ryde Commissioners*, even regarding it as an authority, has no application here, and that, as the view presented to us on the part of the plaintiff is unsupported by any authority, this rule should be discharged with costs.

HARGRAVE, J. I concur with the *Chief Justice* in thinking that this case must be stripped of all the technical considerations that govern the English cases that have been cited, and that it will have to be decided on the construction of the words of our own Municipalities Act. The English authorities were all decided with reference to proceedings against parishes or counties at common law, but here we must be guided by our own statute law, as affecting all these boroughs throughout the colony. Now, it is conceded that, if a municipal council, in laying down a gas-pipe across a road, dig up the surface of the road, and leave a hole, and some one falls into it, that it is a breach of duty on their part for which they are liable in an action. But it is said that, if a similar hole is formed by the action of the weather or by wear and tear, and some other cause, then, because the hole is not actually *made* by the council, or for some such reason, they are not bound in law to fill it up, or even to put up a lamp at night to warn people off; nor liable to an action if they neglect to do so, and some one through their neglect is half-killed. From first to last in this Act I can see no trace of such a distinction. Let us look at the statute itself. First, there are the original strong words of the 117th section—The council shall have "*the care, construction, and management* of public roads and thoroughfares" in their municipality. Then in the 118th section we find these expressions:—"the *interference* of any council with any public road, &c.;" "transferring to the council the *charge* of any such public road, &c.;" "the *management, control*, or other *dealing* with any such public road." I observe that in these two sections the Legislature has used no less than seven different forms of expression to indicate the position of the council with respect to the roads and streets within its district. It seems to me as if words had been heaped up in order to make it quite clear that these councils are to have every possible power and every possible duty connected with these roads. It may be said that this only shews that the Act is badly drawn; for it is a general rule that in drawing an Act of Parliament the same words

should always be used with reference to the same subject-matter. But it is our duty to try to give force and effect to these different words, if we can; and I think they may very probably have been used in order to place the duties and powers of these councils beyond any doubt. When such comprehensive words are used, it would be difficult to argue that there is any possible thing that could be done to these streets that they are not authorised by this Act to do. Nor do their powers end there. By the 119th section the council are empowered to dig and remove stone, gravel, or any other road-making material *for the making or repairing of any road*, without payment to the owner of the land from which it is taken. Section 120 gives them power to "form, macadamise, and otherwise make good, and to repair and maintain" streets adjacent to the municipality, "*in like manner as any public road or street within the municipality.*" Then the council of one municipality can compel the council of an adjoining municipality to repair, maintain, &c., any road or street lying partly situated in both municipalities. By s. 153 they can make by-laws for "*collecting and managing tolls, rates and dues upon roads;*" and under s. 164 they may raise an amount by assessment and rate for various purposes, including "*the fencing, making and repairing of any roads.*" Is it possible that, if the repairs which were necessary to prevent the accident to the plaintiff in this case, had been undertaken by these defendants, any ratepayer could have come forward and objected that they were doing work not authorised by the Act? And that is the true test in all these cases. If the work is authorised by the Act, and means are given by the Act for doing it, then it is the duty of the council to do what is authorised. Why would the Legislature give them powers, if they are not to be used for the good of the public? To take a common sense view of the matter it would come to this—that the Legislature have authorised the defendants to make traps for people; to make drains, and then allow them to fall in, so that the street cannot be used without the lives of passers-by being endangered; and then, when a person, lawfully and properly using the street, falls into the hole and sustains an injury that will cripple him for life, these defendants cannot be compelled to make him any compensation. These councils may not spend one penny of their funds in keeping the streets in order; they may apply all their money in putting kerb-stones opposite aldermen's doors, or building grand town-halls, or giving picnics; and there will be no remedy for all this. Throughout this Act there is not one word which draws any distinction between the improper construction of streets, and the neglect to repair them. And are we to introduce such a

distinction when the Act is silent upon the matter? Construing the statute according to common sense, it is as plain as sunlight that the council are bound to repair these streets. Look at the words themselves. A "road," *ex vi termini*, implies user by the public, and the consequent wear and tear. Even if there are no directly imperative expressions in the statute, the words "care and management" carry the duty of repairing. It is tantamount to saying that the public shall not have the right of using the road if the persons having the "charge and control" of it need not repair unless they like. Everyone knows that, if you live in a municipality, you cannot do anything at all without the consent of the council. A man is not allowed to fill up a dangerous hole in the street near his house, himself; he cannot even make a footpath in front of his own door, or cut a gutter to let the water run off his own land. If he attempted to do anything of this kind, he would be told at once that he was interfering with the corporation's work. He would be better off in an English parish, because there he could indict the parish authorities; but here, though he cannot walk home at night without being in danger of breaking his neck, and though he pays rates, he is to have no remedy at all. If the corporation is the only body authorised to meddle with the streets, it must follow as a matter of course that they must repair them. It is said that the council may not have sufficient funds to repair the streets with. That is perfectly ridiculous in the present case. Here is a borough with a very large income from rates, and with the power of raising more money by tolls if they like, and they might have put two posts in the ground and a sapling across them in front of this hole, and hung a lamp there at night, and the accident would never have happened. As they did not choose to incur such a small expense, and as a plain duty is cast upon them by the statute, when an accident does happen they *must* be liable for the consequences if some one is hurt through their neglect.

I base my judgment entirely upon the construction of our own statute; but I would like to make one remark with reference to the English cases. They simply amount to this—that the old common law parishes can only be proceeded against by the old established proceeding of indictment; but there is no such rule with reference to the numerous municipal corporations that have been established by statute. A number of the great towns, such as Birmingham and others, were not common law boroughs, but have been incorporated by comparatively recent statutes, and I am sure it would astonish the mayors and aldermen of those towns to hear that they are not liable to keep their streets and drains in order. It is true that no actions have been brought

against any of those bodies, but the reason for that is, that there people know their duties, and do their duties. Corporations in England do not leave their streets out of repair, or with dangerous unprotected cavities like this in them, and if any accident does happen, they know better than to contest their liability, and make proper compensation for it. I think the effect of his Honor's summing up was to take this case altogether away from the jury, and that he was wrong in directing them, as he practically did, that these defendants were not liable at all, and the rule ought to be made absolute with costs.

Sir WILLIAM MANNING, J. I give my judgment in this case with no little diffidence, and with some degree of doubt, because my view, as applied to the special facts of the case, is not only opposed to the ruling and more matured opinion of the *Chief Judge* who presided at the trial, but also to the apparent authority of decisions pronounced in England with reference to the English common law and to written statutes. The question raised by the terms of the rule *nisi* is far broader than is, in my view, necessary to the decision of this case. I do not think it right, on this occasion, to inquire broadly into the question of a municipality's obligation to make all repairs of streets and roads which the convenience of the public may demand, but shall confine myself to the question which the facts of this case compel me to decide. It is this, whether the borough of Bathurst is responsible in damages to the plaintiff for the injury he sustained through the perilous condition in which one of the streets of the borough was allowed to remain? And, in considering that question, I shall keep in view the facts that the street was one which the corporation had made and guttered at a previous time, and that the work done by the corporation (although found by the jury to have been reasonably sufficient at the time) had, in fact, given way, and that a large and dangerous hole had been caused and been in existence for a time amply sufficient for allowing of repairs, and that such repairs might have been executed at a trifling cost (40s.), and in a short space of time. If this corporation be irresponsible for the consequences to the plaintiff of their neglect to prevent or remedy this defect in the street, then there would, of course, be equal immunity to the corporation of Sydney if it were supinely to neglect the filling in the most obviously dangerous places which might casually have arisen in George-street of this city. It would certainly be against natural reason to hold that no duty arose on the part of the council and its officers to protect the public under circumstances so manifestly demanding their interposition as custodians of the public thoroughfares. But still the law may be so, though reason be against it. Whether this be so,

or not, is the question. It is admitted that these corporations are responsible in respect of any injury occasioned by incidental negligence in the course of works performed by them, such being regarded as matters of misfeasance. But it is contended that there is no such responsibility in respect of negligences in the way of non-feasance or omission; in other words, that these corporations are not under any duty to make repairs, even in cases of the most obvious necessity, for protection of life and limb, but have an uncontrolled discretion as to whether they will, or will not, make such repairs; and that they enjoy a complete immunity from liability for injuries caused by exercising that discretion in the way of omission. In principle there can scarcely be a serious distinction between the cases of neglects in commission and palpable omission; but it is not to be denied that a distinction has been recognised in law, and that it is not therefore to be wholly overlooked. And if the decision of this case necessarily rested upon the English authorities, I should be compelled to concur with the *Chief Justice* in the view taken by him at the trial, and which he still retains. But are those authorities applicable? Or is this case not rather to be decided upon the Act of our Legislature, and on the circumstances and general law of this colony, and upon reasoning and principle? I have examined the cases cited in argument and a few others; and my opinion is that the English decisions have no proper bearing on this case. A series of those cases have no doubt decided against the liability in question, in the case of highway surveyors, county surveyors, local Boards of Health, Vestries, and Towns Improvement Commissioners. But in all these instances there underlies an element which has no existence in this country; and that element is this—that, by the common law of England, the parishes into which it is legally divided are bound to repair all roads (and counties in the case of bridges), and that it is not to be supposed, in construing statutes such as those under which highway surveyors and others act, that the Legislature meant to create a *duplication* of liability by making another body liable concurrently with the parish (or county), or to *transfer* the liability otherwise than by the most express words; and in some of those cases the officers or bodies sought to be made liable were regarded as servants of the parish (or county), and not principals. In the case of *Russell* v. *The Men of Devon*, in which the obligation to repair was recognised, the defendants were held irresponsible for injuries caused by non-repair of a county bridge, because the inhabitants were not incorporated, and were a fluctuating body, and because execution might be levied on one or two persons who would have no remedy for contribution against

others. On the other hand, the liability was established in a case against the Mersey Docks Trustees; but I do not rely upon that in favour of the liability here, because the Mersey Docks Trustees were virtually in the position of persons who had contracted with ship and cargo owners to give safe accommodation in consideration of tolls to be paid in each case, and who had so negligently performed their contract as to constitute a breach of it by negligence. Here, however, we have no parishes on whom devolves the duty of repairing roads, nor any counties bound to repair bridges; and therefore the common law of England does not apply in this respect. Consequently, we are not here embarrassed, as in England, with the primary or general duty of those bodies as an element in construing our statute. And, on the contrary, the public have no remedy whatever unless they possess it as against municipal bodies where such have been established. And, in connection with this last feature, I may refer to the language of *Crompton*, J., in *Hartnall* v. *The Ryde Commissioners*, where he says, "There has never been an Act of Parliament which has thrown the obligation to repair on *two bodies;* but, on the other hand, the *public have always had some one body of persons to look to.*" May not our Legislature have had in view the creation of *some one body of persons* to look to for at least so much repair as would be necessary to protect life and limb? Under these circumstances of fact and of general law within this colony, it appears to me that the question at issue must be regarded very much as one of "first impression." As such, and in the absence, as I think, of any applicable authority, the question is not one in which I can venture to pronounce an opinion without hesitation, or without doubt. But as the question must be decided, I do so to the best of my judgment, and subject to correction by a Court of appeal, if wrong.

It is, indeed, matter for regret that the Legislature has not expressly declared the duties of these municipal councils in respect of public thoroughfares committed to their care; or else expressly trusted to their discretion, and absolved them from all responsibility to individual persons. But neither has been done, and my duty is, therefore, to interpret the Act by the application of reason and principle to its language. In so interpreting, I bear steadily in mind that the question is as to removal of defects which are obvious sources of peril to life and limb, and which could have been removed without difficulty, and without a greater expense than the revenue would enable the council to bear. And I further keep in view the fact that these streets and roads correspond with those for the repair of which the common law has provided in England; and that if these municipalities

are not bound to repair in such cases as I am considering, then there is no remedy whatever in this colony. Various clauses in our Municipalities Act have been referred to in argument, but I think it sufficient to give attention to the 117th section (in connection with the general scope and objects of the Act in establishing local government), and the 164th, in connection with the 163rd, and some subsequent clauses, defining the property which is to be ratable, and the processes for enforcing payment. By section 117 "the care, construction, and management" of the public streets, within the municipality, are taken out of the hands of the general public and its executive, and placed in those of the councils or governing bodies of the localities which think fit to accept municipal incorporation; and by section 164 the councils are empowered and required to make assessments and rates for the purpose, amongst others, of repairs to the streets, &c. The effect of these is to give to the councils the exclusive care and control of the streets, and thus to give to them, and to them only, the power to do all needful repairs; and at the same time to provide them with the means, by statutory compulsion, for doing such repairs; and even to require them by peremptory language to make provision for outlays on that object amongst others. In principle, I take it to be a clear rule of construction that, where a power and means for its exercise are given for a public purpose, a corresponding *trust* and *duty* arise for the due exercise of that power. And here we have the "care" of the streets given to and accepted by the municipal body; and yet it is contended that, nevertheless, they are under no obligation even to take such "care" of the streets as is needful to prevent peril to life and limb on the part of the general public. To them alone is given the power to meddle with the streets in any way, and to them are entrusted the means for making repairs when needed; and yet it is said that they may, if they choose, leave such necessary work undone. This appears to me to be opposed to reason and principle; and I, therefore, must reject it in the absence of controlling decisions to the contrary. Having accepted the exclusive care of the streets, and, having taken the means, I think the council bound to take reasonable "care" of the streets in proportion to the means provided. Of course no one could deny that, morally and politically, the duty to remove from the public streets defects which are no other than man-traps arises out of the character and position of the council and the provisions of the Act; and, for my part, I see no reason for so construing the Act as to make the legal position and duty of the councils other than such as attach to them politically and morally. It will be remembered that I am not asserting any obligation to

put all the streets and roads at once into a state of repair suitable for general convenience or purposes. That must be a work of time, and must be restricted within the limited means which the Act authorises the councils to raise. And, in the use of such means, regard must, of course, be discreetly had to the other public requirements of the municipality. But I repeat that my opinion is confined to cases of obvious necessity and urgency on account of peril to those who have the right to use the streets, and to repairs of such limited cost as cannot be beyond the means at command. And in referring to the matter of limited means, I do not forget that in some of the English cases the want of means was held to be no excuse for the neglect of an unquestioned duty; but I bear in mind that under our Act the amount of means is restricted to 1s. in the pound, and I conceive that in interpreting the statute we must consider the duty to be limited to the powers of the council, and the powers to be limited to the means. There is, indeed, one case (*Harris* v. *Baker*) to which the *Chief Justice* has referred, in which persons were empowered to place lamps in streets for the security of the public, and yet were held not to be responsible for an injury caused by the want of a lamp in a particular locality; but there a discretion was expressly given, and I think there is a wide difference between this omission to provide artificial light for public convenience and an omission to close a dangerous pitfall in the surface of a street. I have noticed the circumstance that the road in question in this case was one which had been formed by the council and had got dangerously out of repair since they had operated upon it. This I cannot help thinking somewhat material; for who shall say that if the council had left the street in its natural state the defect would have arisen? The course of water is altered and redirected by the formation and guttering of streets; and however efficiently the work may be done, in the sense of providing for reasonably expected contingencies, it is far from unlikely that the washing out of the hole which caused the plaintiff's injury might have been indirectly occasioned by the corporation's own work. This would seem to call upon the council more plainly to repair the resulting defect. Having regard to the relation in which the council stands towards this street, and its relations also to the public, for whose secure use it has been dedicated, it does not seem to me that an analogy to the cases of the owners of dangerous animals which cause injuries to others is very remote. Nor do I think it unreasonable to import into our interpretation of the Act, and its application to this case, some attention to the laws with reference to nuisances in public streets, and negligence in their removal by those who alone have the power. In some of the English cases

it was regarded as an element in the interpretation of the statutes there in question, that a multiplicity of actions would be likely to arise out of a decision that actions might lie for non-feasance; but such a ground of argument might not be pushed too far. And in this case the decision at which I arrive, limited as it is to certain obvious cases, cannot, I think, lead to more litigation than it would be politic to sanction. The effect will rather be to make the councils and their officers more watchful for the safe condition of the streets under their charge, and to postpone to that object the erection of town-halls or other less urgent works, and in this way the number of instances in which occasion will arise for seeking compensation for injuries will be reduced to the public. In general, the security of the public will be very easily caused by timely, and not costly, repairs, and in no point of view does it appear to me that we need apprehend inconveniences from the decision of Mr. Justice *Hargrave* and myself, which will be more than commensurate with the advantages it is calculated to ensure to the public.

Rule absolute with costs.

Attorneys for plaintiff—*McIntosh, Pinnock & Price.*

Attorney for defendants—*A. G. Thompson.*

McLAUCHLAN *v.* THE STANDARD FIRE AND MARINE INSURANCE CO. OF NEW ZEALAND. (*a*)

Fire Insurance—Description of property to be insured—Misrepresentation—Materiality of Judge's direction—New trial.

Goods intended to be insured must be specified, either by description, or by reference to the locality where they are kept, so as to be capable of identification. Where, therefore, the Judge told the jury that a certain contract to grant a policy covered certain stock-in-trade and furniture, not specified and described in the contract, wherever they might be, *held*, that the direction was wrong; but a new trial refused, on the ground that, under the circumstances of the case, the ruling was immaterial.

In a proposal for a fire insurance on stock-in-trade and furniture, opposite the printed words, "Describe the construction of the buildings," was written, "Brick and slate roof." A ground plan was attached, shewing a space at the rear of the brick dwelling-house covered with buildings marked as "sheds and workshops—hardwood palings and galvanised iron roofs." Outside the lines enclosing the space was written, "detached." *Held*, that the proposal, taken with the ground plan, did not contain any representation that the goods to be insured were contained in a brick building roofed with slate.

Per Sir JAMES MARTIN, C.J.: The printed questions in the forms of proposals used by insurance companies are not conditions; and if the company accepts a proposal in which answers are not given, though required, the company is bound by the contract so made.

DECLARATION. 1. Policy of insurance against loss or damage by fire on certain furniture and household effects of the plaintiff to the value of £50, and on carpenter's and cabinet-maker's stock-in-trade, tools, &c., to the value of £450 upon certain conditions (set out). Destruction of the stock-in-trade by fire, and performance of conditions precedent. Breach—non-payment of the amount insured. 2. Promise in consideration of £5 then paid to issue a policy in conformity with the plaintiff's proposals. Breach—non-issue of such policy. 3. Promise in consideration of £5 to be paid to issue a policy in conformity with plaintiff's proposals. Breach—non-issue of such policy.

PLEAS. 1 and 4. *Non assumpsit.* 2 and 6. That the goods were not burnt as alleged. 3 and 5. That the proposal in the said counts respectively mentioned contained a representation that the said carpenter's and cabinet-maker's stock-in-trade and premises in the said counts mentioned were situate in a certain house built of brick and roofed with slate; whereupon, and relying on such representation, the defendants made the said promise in the said counts respectively alleged, and not further or otherwise; whereas in truth and in fact the said carpenter's and cabinet-maker's stock-in-trade, tools and other articles, in the said counts alleged to have been destroyed by fire, were not, nor were any of them, situate in a house built of brick and roofed with slate in accordance with

(*a*) June 14.

the said representation, but in so much more dangerous a situation, that, had the said situation been set out in the said proposal, the defendants would not have made, or would have demanded a much higher premium as the consideration for, the said promise. 7. Denial of the alleged breaches.

At the trial before *Faucett*, J., and a jury at the Sydney Sittings in February, 1877, the following facts appeared in evidence. The plaintiff, a carpenter and cabinet-maker, carried on his business, partly in a dwelling-house, which was built of brick and roofed with slate and contained four rooms, partly in sheds built of wood and roofed with galvanised iron in the yard at the rear of the dwelling-house. All the stock-in-trade, benches, tools, &c., were kept in the sheds, one of which was used as the workshop. The finished furniture was polished and kept in the front room of the dwelling-house, which was used as a shop. An insurance agent named Holloway called upon the plaintiff, and asked him to insure his premises in the defendants' office. The plaintiff took Holloway round the premises; shewed him all the sheds; and pointed out the stock-in-trade there, as well as the furniture in the house, as the subject to be insured. The plaintiff did not fill up a form of proposal himself, but signed a form in blank, merely inserting the amounts for which the property was to be insured, and Holloway took away with him the blank form so signed. Holloway did not fill up the blank form, but wrote across it, "See other form as annexed hereto," and filled up another form, not signed by the plaintiff, which he annexed. The proposal was afterwards accepted, and a promise to issue a policy was made by the defendants, but before any policy was issued a fire took place, and the sheds in the yard, with their contents, were destroyed. The defendants then gave the plaintiff a policy describing the property to be insured as contained in a house built of brick and roofed with slate, and the plaintiff took it under protest. It was proved that Holloway was paid a commission by the defendants, and it was contended that he was the agent of the defendants and not of the plaintiff. Evidence was then given on the part of the defendants, to shew a usage, by which an insurance broker, such as Holloway was, was considered the agent of the assured, and not of the insurance company. The learned Judge, though he thought the usage was not made out, ruled that Holloway was the agent of the plaintiff, and not of the company; but he told the jury that the form of proposal signed by Holloway did not contain any representation that the property insured and burnt was contained in a house built of brick and roofed with slate. The jury found a verdict for the plaintiff, with £333 8s. 8d. damages. A rule *nisi* for a new trial was obtained in March

last, and now came on for argument. The form, as filled up by Holloway, is given on the next two pages, the italics on page 227 representing the written answers to the questions.

The letter by which the proposal was accepted was in the following terms:—

71 Pitt Street,

Sydney, 2nd August, 1876.

To Mr. J. McLauchlan,

103 Liverpool Street.

SIR,—I have the pleasure of informing you that the Directors have this day accepted your application for an Insurance on the usual conditions of this Company on—

Furniture and household effects	£50
Carpenter's and Cabinet-maker's stock-in-trade, tools, &c.	450
	£500

to the extent of £500, and that on payment of the twelve months' premium of £5 a policy will be made out and forwarded without delay. I am, Sir,

Yours faithfully,

A. L. Park,

General Agent for New South Wales.

20s. rate per cent.

After the £5 was paid the plaintiff received from the defendants the following document:—

Interim Fire Policy.

Sydney, 5th September, 1876.

Mr. James McLauchlan,

103 Liverpool Street.

Having this day effected an Insurance against fire for £500 for the period of twelve months from 5th September, 1876, to 5th September, 1877, on Furniture, &c., £50, Carpenter's Stock, &c., £450, on the conditions indorsed on printed form of Fire Policy used by this Company, and in accordance with proposal under the hand of the Assured, dated 10th August, 1876, and having paid the premium thereon amounting to £5, a policy in conformity therewith will immediately be prepared and issued if required.

A. L. Park,

Agent, per J. S. T.

Rate 20s. per cent.

Description of Property to be Insured.

NOTE.—Where the Property to be insured is, OR IS CONTAINED IN, MORE THAN ONE BUILDING, a SEPARATE sum must be placed on each item.	Sum to be Insured.	Rate per Cent.	Premium.
On Furniture and Household Effects	50		
,, *Carpenter's and Cabinet-maker's Stock-in-trade, Tools, &c., &c.*	450		
Total...	£500		

Situation of Buildings to be fully described.	103 *Liverpool-street.*
Describe the construction of the building.	*Dwelling house,* 3 *upstairs rooms and kitchen.*
Built of	*Brick and Slate roof.*
Roofed with	*Slate.*
If adjoining, describe construction of buildings on each side.	*Brick, and slate roof.*
Term for which insurance is required.	12 *months.*
Nature of the business carried on therein.	*Cabinet-maker.*
Names and Addresses of two Referees as to Applicant's respectability.	*Andrews of Petersham, and Henderson, Coal Merchant, Woolloomooloo.*
Sums already insured in this or other offices.	*None.*
Name of owner of premises.	*Andrews.*
Nature of Applicant's interest, or that of the person to be assured.	*Tenant.*
Is kerosene or other similar oil stored for other purposes than lighting any of the buildings on the premises?	*No.*

THE STANDARD FIRE AND MARINE INSURANCE COMPANY OF NEW ZEALAND.

MEMORANDA FOR THE GUIDANCE OF THE COMPANY.

1st.	STATE— Of what materials walls of each distinct building are constructed. Also the height of the buildings, and whether of one or more stories. If of wood, whether HARD or SOFT.
2nd.	What the roof of each is covered with, and if with shingles, whether made from HARD or SOFT wood, and how much the eaves or the extreme outer line of the slates, shingles, or other covering projects from the face of the wall.
3rd.	How the fire-places are situated, and of what materials they are constructed. Height of chimneys and of what materials built, and whether there be any outside covering of Wood or Bark.
4th.	The height of the Ceilings and of what materials they and the inside walls are constructed, and whether there be any canvas or calico covering to either, and if so, whether such canvas or calico is covered with paper.
5th.	Whether the building (or *each* building if more than one) is detached from, or attached to, OTHER BUILDINGS. State the construction of, and trade carried on in such other buildings, and the DISTANCE intervening, if detached. *Note.—This enquiry refers to buildings whether intended for insurance or not.*
6th.	If there be any party walls between the buildings, and if carried above the roof.
7th.	If there be any coppers or iron boilers with their flues attached to any of the walls of the buildings or any iron or metal pipes for smoke or heat.
8th.	The distance from a sufficient supply of water in the event of fire; also, if the access to the water be easy or otherwise.
9th.	The distance between the buildings and the bush or scrub, or standing trees.
10th.	Value of property upon which insurance is sought, and any other information of importance, so that the Directors may form a just estimate of the risk.

These Queries should be answered as clearly and as briefly as possible.

Note.—A rough ground plan, shewing the distance between each of the buildings is easily made, and will save much time and trouble in description.

*Signature of Applicant,*_____

*Date,*_____187 .

The first count was founded on the document of the 5th September, treating it as a policy; the second on the promise contained in it to issue a policy; and the third on the promise contained in the letter of the 2nd August. The grounds upon which the rule *nisi* was granted were:—1. That his Honor should not have told the jury that upon the construction of the two papers containing the proposal to insure, signed respectively by the plaintiff and Edward Holloway, and upon which the defendants relied in making their contract, there was no statement or representation that the goods proposed to be insured, or any of them, were contained in a brick building roofed with slate, or in any building at all, and that the description of certain premises given on the face of the said documents, or one of them, was irrelevant to an insurance of goods, and that, consequently, the defendants in accepting the risk, as shewn by the said documents or proposals, contracted to insure the goods therein mentioned wheresoever situate, and that the defendants had failed to carry out this contract. 2. That his Honor should not, when directing the jury upon the issues raised as to misrepresentation, have directed them that such misrepresentation arose on the face of the documents, if at all; and would depend upon his construction of the documents, and that no such misrepresentation could arise upon the face of the said documents, inasmuch as, in his opinion, as a matter of law, there was no representation in such documents that the goods proposed to be insured, or any of them, were situate in a brick house roofed with slate.

Butler, Q.C., and *Manning* appeared for the defendants in support of the rule; *M. H. Stephen* and *Knox* shewed cause.

Sir JAMES MARTIN, C.J. This action was brought to recover compensation from an insurance company, not on the usual policy of insurance, but on the preliminary contract which the parties had entered into with a view to a policy being issued. The controversy turns on the issue raised by the second count. The plea to that count was that the plaintiff represented that the goods to be insured were contained in a building built of brick and roofed with slate. At the trial two papers were put in evidence to shew what the contract really was, and what was the representation complained of. There was a conflict whether the plaintiff was bound by the contract contained in these two papers; but nothing turns upon that now, because his Honor at the trial assumed that, under the circumstances, both these documents were binding, and so told the jury. The misdirection complained of is a ruling by his Honor that there was not, upon the face of the documents constituting the proposals, any representation by the plaintiff that the goods were contained in a

brick building with slate roof, and that the contract was to insure the goods wherever they were, and that it was immaterial where they were situate. To that ruling the defendants have taken exception, and the question we have now to decide is whether his Honor was right. So for as regards that portion of his Honor's ruling in which he said that it was immaterial where the goods were, I think his Honor was in error. In insuring goods the people who insure must have some means of identifying the property insured, either by the locality where they are being described, or in some other way. Some things are identified by the mere description. For instance, a particular ship, if its name is specified, can be known and identified wherever it may be. But where the property cannot be specified in that way, there must be some other means of fixing its identity; more especially if the property is of such a fluctuating nature as stock-in-trade, which is always increasing or diminishing, or otherwise changing. Such things can only be identified by a description of the place where they are situated, and, if insured, they must be insured with reference to some locality. If his Honor is to be understood to have laid down the law in the broad way complained of, I think he was in error; but I do not understand his Honor to have so ruled. He must be taken to have confined his expressions to the circumstances of this particular case; and his remarks must be taken in connection with the fact, which appears to have been admitted, that these goods, if anywhere, were in a certain fixed locality. There was no contest at the trial whether the goods burnt were within the premises occupied by the plaintiff.

But the defendants also complain that his Honor directed the jury that the contract in this case did not contain any representation by the plaintiff that the property to be insured was contained in a house built of brick and roofed with slate. To decide that question we must look at the contract which, as in all insurance cases, originated in proposals by the assured. These insurance companies have printed forms in which they desire that proposals to them should be framed. This particular form contains a number of questions. By themselves, they are mere questions, and nothing more; they do not amount to conditions; they are no part of the contract; but only convey an intimation that the company wishes them to be answered. If the assured does not answer them, and the company does not insist on an answer, they are of no consequence at all; they are mere preliminary talk. Well, two papers were sent in to the defendants. One was signed by the plaintiff. It was a mere proposal to insure household furniture and stock-in-trade to a certain amount, without any specification of the goods to be

insured, and without any answers to the printed questions. In accordance with the view I have already expressed, an acceptance of such a proposal would amount to nothing, because it would be impossible to see from the contract what the property to be insured was. However, another paper was attached which went before the defendants and must be taken, after his Honor's ruling at the trial, which is not now disputed, to be a part of the contract. Opposite some of the printed questions were written replies. For instance, after the words, "Situation of buildings to be fully described," we find "103 Liverpool-street" written. Then come the words "Describe the construction of the buildings," and the answer is "Dwelling house, 3 upstairs rooms and kitchen," which in the next line is stated to be "brick and slate roof." This proposal was accepted by the defendants in a letter which was put in evidence, and the two documents formed the complete contract on which this action was brought. The issue being, as I have stated, whether a misrepresentation had been made by the plaintiff that the goods insured and burnt were contained in a building built of brick and roofed with slate, his Honor had to decide the question whether the plaintiff's written proposal contained such a representation, and he ruled that it did not. If there had been nothing more in this proposal than I have stated, it might be impossible to resist the conclusion that all the buildings in which any part of the goods to be insured was contained were represented to be constructed as stated. But over the page is another list of questions, none of which were answered, and under them are the following words:—"A rough ground plan, shewing the distance between each of the buildings, is easily made, and will save much trouble in description." Opposite, a blank page is left, headed in print, "Ground Plan." And there a ground plan is drawn, which admittedly was before the company's resident agent at the time he accepted the risk. It is not very well done, but it seems to me to shew that the property to be insured is described as being contained within three lines enclosing a considerable space to the rear of the house itself. Outside each of these lines is written the word "detached." It seems to me that that word shews that the space stated to be detached was where the property to be insured was. And how are the buildings in this space described? "A shed—galvanised iron and hardwood palings," "sheds, workshops, roof galvanised iron, and hardwood palings." No doubt on the first page of the proposal there is a note—"Where the property to be insured is or is contained in more than one building, a separate sum must be placed on each item." But that is just a question, with an intimation how the company would wish it answered. Although

they make this request, if it is not answered, and, notwithstanding that, the defendants go on, issue a policy and accept the premium, they are bound, even though their request is not complied with. It is clear that the plan shews workshops and sheds, as well as the house in Liverpool-street. It therefore appears to me that on the face of this proposal (of which the ground plan is a part) there is a statement that some portion of the buildings was constructed of hardwood palings and not brick, and roofed with galvanised iron and not slate. His Honor ruled that this paper did not contain a representation that all the property insured was contained in a brick building roofed with slate, and I think his Honor was right. It was for the defendants to make out the representation; they attempted to make it out by this proposal, and I cannot see that they succeeded in doing so. We have been referred in argument to the first condition indorsed on the policy, which is in these terms:—"The insurance on any buildings shall not be held to include anything outside thereof, such as clap-boarding, fences, blinds, galleries," &c. That only means that where a *building* is to be insured, the insurance will not cover anything except the building itself; but it has no application here, where the plaintiff's intention was to insure goods outside the main building. Our attention has also been called to the fact that a blacksmith's forge and other buildings not on the plaintiff's premises at all are shewn in the plan, and it has been contended that the ground plan was only drawn with the object of shewing the surroundings of the risk. I do not think it was so. The word "detached," in my opinion, was put there to shew the company that the premises in which the property to be insured was situated were detached. It could have no other meaning.

I have already stated that the broad way in which his Honor laid down the law was, in my opinion, erroneous. If I could see that there was any chance of another jury giving a different verdict, I should be in favour of granting a new trial. But at the trial there was no contest as to whether the goods burnt were within the premises described on the ground plan. Unless there were something to shew us that the jury may have found a verdict in favour of the plaintiff in respect of goods outside those premises altogether, I think that that ruling could not possibly have prejudiced the defendants. No such point was taken at the trial, or is taken now. It seems to me that if this case were sent down for another trial there could be only one result. So long as this Court are of opinion that these documents do not contain a representation that the goods insured were in a house of the kind described, it would be impossible for the insurance company to succeed in the action. Although, therefore, I think

his Honor's ruling went too far, I cannot see that we should be justified in granting a new trial, and this rule ought to be discharged.

HARGRAVE, J. I entirely concur with his Honor. I think this rule is one of those frequently brought before us, where a great deal of time is taken up, but when the question is thoroughly looked into, the rulings complained of as misdirections are not matters for granting a new trial at all. I consider them only as statements of the opinion of the Judge to the jury. They are not, properly speaking, misdirections at all. By a misdirection I understand a wrong ruling on a matter of law which has reference to the evidence in the case. I think the principle laid down by his Honor in construing these documents was too broad, and I quite concur that the contract entered into on the basis of this proposal does not apply to property out of the premises altogether. I also agree that the things to be insured must be specified in some way. But they are specified here by the plan. There was no misunderstanding as to the goods, and the jury were not induced by his Honor's ruling to consider any goods except those which were burnt on the plaintiff's premises. The Judge went farther than was necessary in directing the jury upon the facts of the case, but it was impossible that the jury can have been misled. The case of *Black* v. *Jones* (*b*) shews that a new trial ought not to be granted for such mistakes of a Judge. It is there said by Lord Chief Baron *Pollock*:—"We consider in a case where the point of law is purely collateral, that it is not only the right of the Court, but their duty, to see whether, in the particular case, the supposed misdirection really has produced any miscarriage. Addressing our minds to that subject, we think it has not in the present instance; and conceding to the Bar that wherever there has been a misdirection on the point immediately at issue, a rule for a new trial is a right—conceding that—we think it is not a right where the point of law is purely collateral, and is introduced merely by way of illustrating some question of fact in the course of the trial." By "collateral" must be understood points collateral to the evidence and not bearing directly upon it, or leading the jury to a wrong conclusion upon the issues they had to try. It is only in cases where there has been a failure of justice that we ought to grant new trials upon such grounds as those put forward here. We ought not to hurry parties back into fresh litigation merely because the Judge at the trial begins his summing up with some general statements of the law, which can have no possible effect on the minds of the jury in considering the questions they have to try. I rest my decision also upon the fact that if we granted a new trial the defendants cannot succeed.

(*b*) 20 L.J. Ex. 152.

FAUCETT, J. I am not at all disposed to dispute the accuracy of counsel's notes of my summing up, and shall assume that those notes are correct. The real question, and only question, raised can be stated in a very few words. It is raised by the 3rd and 5th pleas, which allege that the plaintiff represented to the defendants that the carpenter's and cabinet-maker's stock-in-trade and premises were contained in a house built of brick and roofed with slate. That is the alleged misrepresentation. The plea goes on to shew that the misrepresentation was material to the risk. The only point that required direction was whether these two documents contained any such representation. That was the only question, but I confess I had considerable difficulty in construing these documents. But, after hearing the matter argued, I entirely concur with their Honors in thinking that there is no such representation as alleged in these documents. That was the only *direction* I gave the jury; nothing that I said beyond or beside that could possibly have misled them on that point. In fact, it can hardly be argued that the jury were in any way misled. But, having stated my opinion upon the construction of the documents, one of the counsel for the defendants suggested that, if I was right, the goods might be anywhere. I said, in reply, that it might be so, probably it would be so. That is, according to my recollection, what took place. I admit that the opinion I then expressed went farther than was consistent with the law; and I agree that in a contract of this kind there must be some statement identifying the goods and shewing what they are, either by specifying the place where they are situated, or in some other way, and I do not at all question the law as stated by his Honor the *Chief Justice*. But the question, whether the goods ought to be specifically described, did not arise at all in this case. There was no dispute that the goods were fully identified as those intended to be insured.

I am clearly of opinion that there ought not to be a new trial. How could the jury have been misled? Upon the present ruling of the Court it would be utterly impossible for the defendants to succeed. Has there ever been a case where an action has been sent down to another trial, merely to limit the Judge's statement of the law upon an immaterial point, when it is admitted that the verdict must be exactly what it was before? There was no evidence of any representation by the plaintiff to the defendants other than the statements contained in these documents; and upon the construction now adopted by the Court the plaintiff must succeed. My idea at the trial was that the action was resisted by the defendants under the impression that the claim was beyond what was reasonable. A great want of care on the part

of insurance companies appeared in the evidence. It was stated that proposals were commonly accepted without any inquiries and without sending a surveyor to inspect the premises, leaving it to the risk of the assured whether his description was correct or not. For their own sakes these companies ought to take some such precautions. Had they been taken in this instance this action would probably never have been brought.

Rule discharged with costs.

Attorney for plaintiff—*W. Barker.*

Attorneys for defendants—*Curtis and Gannon.*

ASH *v.* JONES. (*a*)

Assignment of debt—Certainty of amount—Presumption as to verdict of jury.

The plaintiff, in an action brought to recover £45, gave evidence that F., being indebted to him, had transferred to him a debt due from the defendant, that the defendant had agreed to the arrangement, and had at the time of such agreement been given an account shewing the amount due to be £55; and that afterwards the defendant had paid two sums of £5 on account, for which the plaintiff gave credit. The defendant's witnesses denied that any arrangement was made, and also stated that before the date of alleged arrangement, £25, for which credit was not given, was paid by the defendant to F. on account of the debt, so that £55 was not due from the defendant to F. at the time of the alleged transfer. The *Chief Justice* told the jury that at the time when the defendant agreed to pay the plaintiff the debt due to F., the amount of the debt must have been ascertained, in order to entitle the plaintiff to a verdict. The jury found a verdict for the plaintiff for £20.

Held (on motion for a new trial on the ground that the verdict of the jury shewed that they thought the debt unascertained in amount), that the jury must be taken to have followed the *Chief Justice's* direction, and to have found that there was a legal assignment, though they deducted the £25 alleged to have been paid by the defendant before the transfer of the debt.

Semble, that a count for money had and received will lie where the original debt transferred was not for money had and received.

Semble, also (Sir W. MANNING, J., *dubitante*), that to constitute a novation there must be an ascertained amount actually due.

DECLARATION. Money had and received, and accounts stated.

PLEA. Never indebted.

In the particulars £45 odd were claimed, credit being given for two sums of £5 paid by the defendant to the plaintiff.

The action was tried before Sir *James Martin*, C.J., and a jury at Maitland in April last. The plaintiff's case was that one Faviell, being indebted to him, transferred to him a debt due from the defendant. An account was made up, shewing the amount due from the defendant to Faviell at £55 odd, and was handed to the

(*a*) June.

defendant. He assented to the arrangement, and afterwards, as was alleged, paid the two sums of £5, for which credit was given in the particulars, to the plaintiff. The defendant and his witnesses denied that any such arrangement was made, and also gave evidence that before the date of the alleged transfer, £25 had been paid on account to Faviell, so that the amount due at the time of the transfer was not £55, but £30 only. The *Chief Justice* told the jury that the plaintiff could not recover unless, at the time that the alleged arrangement was made, the amount of the debt due from the defendant to Faviell was ascertained. The jury gave a verdict for £20 odd, apparently allowing the defendant the £25 alleged by him to have been paid.

On the 4th June *Foster* obtained a rule *nisi* for a new trial on the grounds: 1. That the verdict was against evidence. 2. That the verdict was against the direction of the *Chief Justice*, who told the jury that, at the time when the defendant agreed to pay the plaintiff the debt due to Faviell, the amount of the debt must have been ascertained, in order to entitle the plaintiff to a verdict, and that the jury by their verdict found that the debt was not so ascertained.

Foster now moved to make the rule absolute. An action for money had and received will not lie, unless the original debt was for money had and received: *Wilson* v. *Coupland* (*b*); *Wharton* v. *Walker* (*c*). [Sir JAMES MARTIN, C.J.: That point is not open to you on this rule.] It is included in the ground that the verdict was against evidence. [Sir JAMES MARTIN, C.J.: You cannot raise such a point now. There was no motion for a nonsuit at the trial.] At any rate, the jury must be taken to have found that there was not an ascertained debt at the time the alleged arrangement was made. *Fairlie* v. *Denton* (*d*) decides that it lies on the plaintiff to shew that there was, at the time of the agreement to transfer the debt, an ascertained debt due from the defendant. The plaintiff alleges that there was an ascertained debt—£55; and the jury have found this against him. *Fairlie* v. *Denton* has been always followed. It is also clear that, in the view taken by the jury, the plaintiff could not recover on an account stated; for there must be an acknowledgment of a specific sum admitted to be due: *Kirton* v. *Wood* (*e*), *Kennedy* v. *Withers* (*f*), *Lane* v *Hill* (*g*). The case of *Israel* v. *Douglas* (*h*), relied on by the other side, was disapproved in *Taylor* v. *Higgins* (*i*), and is there said to have been wrongly reported. *Tatlock* v. *Harris* (*j*) and *Liversidge* v. *Broadbent* (*k*) were also referred to.

(*b*) B. & A. 228. (*c*) 4 B. & C. 163. (*d*) 8 B. & C. 395. (*e*) 1 Mood & Rob. 253. (*f*) 3 B. & A. 767. (*g*) 18 Q.B. 252. (*h*) 1 H. Bl. 239. (*i*) 3 East. 169. (*j*) 3 T.R. 174. (*k*) 4 H. & N. 603; 28 L.J. Ex. 332.

Windeyer, A.-G., and *Healy*, for the plaintiff, shewed cause. *Moulsdale* v. *Birchall* (*l*) decides that the assignment of a debt, even of an unascertained or uncertain amount, is a good consideration to support a promise to pay. *Walker* v. *Rostron* (*m*) and *Griffin* v. *Weatherby* (*n*) are to the same effect. The latter case is a direct authority in favour of the plaintiff. In *Hutchinson* v. *Heywortb* (*o*), *Fairlie* v. *Denton* was cited, but was not followed upon this point. *Crowfoot* v. *Gurney* (*p*) decides that, though the amount of the debt transferred was uncertain, an assignment of all that was due would bind the assignor's creditors in bankruptcy. The cases cited on the other side only go to shew that a debt cannot be transferred without the assent of the debtor. We are more entitled to complain of the verdict than the defendant is. The plaintiff has got less by £25 than he was entitled to. The jury could not have found a verdict for the plaintiff at all, unless they concluded that there had been a valid assignment of the debt.

Foster, in reply.

Sir JAMES MARTIN, C.J. In this case an arrangement was come to between the plaintiff and the defendant and one Faviell, by which the plaintiff agreed to release a debt due from Faviell to him, and the defendant, who was indebted to Faviell, promised to pay the debt to the plaintiff instead of Faviell. Such an arrangement is known as "novation," a term lately adopted from the civil law, and used to express the extinguishment of a debt and the substitution of one debtor for another. At the trial there was a conflict of evidence as to whether the arrangement alleged was ever made at all, and the jury were told that the plaintiff could not succeed unless there had been the arrangement spoken of. They must have thought that it was made out; for they found a verdict for the plaintiff. The amount due from the defendant was also contested at the trial. It was said that the sum of £45 claimed was not due, but a less sum—viz., £20—£25 having been paid to Faviell, for which credit was not given in the particulars. Several persons were called to prove that the payment was made, and the jury, it seems, believed them, for they took off the £25, and gave the plaintiff a verdict for £20 only. That would seem to lead to the conclusion that the jury found the necessary tripartite agreement made out, but believed the evidence of the defendant as to the payment of the £25. In their opinion there was a novation. But there has been a miscarriage of justice in the plaintiff receiving less than he was entitled to. That is a result of which the

(*l*) 2 Bl. R. 820. (*m*) 9 M. & W. 411. (*n*) L.R. 3 Q.B. 752. (*o*) 9 A. & E. 375. (*p*) 9 Bing. 372.

defendant cannot complain. It appears to me that the jury followed my ruling, but made a mistake in deducting the £25. No exception is taken to my ruling, and, as the defendant was in no way prejudiced by the jury's mistake, I think this rule ought to be discharged.

It was also contended on behalf of the defendant that an action for money had and received could only be maintained in the case of a transfer of a debt where the original debt was one for money had and received. It is not necessary to decide this question, because it is not one of the points now before us; but my own opinion is that the count for money had and received is precisely the proper form of action in such a case as the present. It appears to me that the cases of *Walker* v. *Rostron* and *Griffin* v. *Weatherby* could only have been decided as they were upon the principle that such an action would lie. Nor does it seem to me to be necessary that the original debt should have been for money had and received.

I think that two principles of law are established, and stand side by side. The first is that "where by consent of all parties the defendant is to pay to plaintiff a debt due from the defendant to A., who is the plaintiff's debtor, it lies on the plaintiff to shew that there was, at the time of the agreement, an ascertained debt due from the defendant to A." I am quoting a passage from *Roscoe's Nisi Prius* (*q*), which seems to me to contain a concise and clear and accurate statement of the law with reference to the doctrine of novation. The debt ought to be ascertained in order to enable the person to sue for it, and the amount ought to be stated at the time the arrangement to transfer it is made. The other principle, in the words of Mr. Justice *Blackburn* in *Griffin* v. *Weatherby*, is "that, where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise." Thus, if there is an order to pay the proceeds of certain goods, whatever price they may realise, to a third person, though the amount is uncertain, if that order is assented to, the person who has obtained the order for good consideration may sue the holder of the proceeds. But, in this particular case, I think the first principle was applicable, and that I was right in my ruling that the plaintiff

(*q*) p. 583; 13th Ed.

could not succeed, unless there was a transfer of an ascertained debt.

HARGRAVE, J. I agree that the rule ought to be discharged. The action for money had and received was extended by Lord *Mansfield* to all cases where the defendant has received, or has in any way in his hands, money which in justice and equity belongs to the plaintiff. He says, in *Moses* v. *Macferlan* (*r*) :—"In one word, the gist of this kind of action is that the defendant, upon the circumstances of the cases, is *obliged by the ties of natural justice and equity* to refund the money." Since then Judges have thought that Lord *Mansfield* went too far; but I am glad to see that the tendency of some of the later decisions has been to restore the action to its position as an *equitable* action. And the jury went upon this principle; they found a verdict for the plaintiff for the amount that he satisfied them was really and equitably due to him. I cannot see that there has been any miscarriage of justice at all. If the plaintiff had not been able to satisfy the jury that, without infringing the principles which regulate novation, he was entitled to recover something from the defendant, they could not have found a verdict for him at all. It is clear, then, that they thought the proper arrangement had been made. Then they go on to see how much the plaintiff is entitled to, and they believed the evidence of the defendant's witnesses as to the payment of the £25. So they give the plaintiff all he is fairly and justly entitled to. I think his Honor's ruling was right, and that the jury found a verdict in accordance with his Honor's ruling, and that, consequently, there should not be a new trial.

Sir W. MANNING, J. This is really a case of a promise founded on a valuable consideration, and not of novation at all. "Novation" is a term unknown to the common law, and is of modern introduction, the expression "assignment of debt" being used in all the old cases. I am of opinion that there is no necessity for us to decide the point of law discussed in the argument, but that the only question is whether the plaintiff, and not the defendant, has sustained a wrong. The jury ought not to have struck off the £25. They believed that there was a novation, and, if so, suppose £25 had really been paid off, what was that to the plaintiff? If, through the ignorance of the defendant, or his want of presence of mind, the plaintiff has been led to alter his position, on the understanding that £55 were due, how can the defendant now take advantage of his own wrong? But my own opinion upon the evidence is most strong that the £25 was not, in fact, paid off. However, if the jury were wrong, it was in the defendant's favour, and I cannot see how he can now ask for a new trial.

(*r*) 2 Burr. 1110.

As the matter has been mentioned in argument, and alluded to by their Honors in their judgments, I think I ought to express my strong inclination of opinion that it is not necessary to constitute a perfect novation, that the debt should be of an ascertained amount. I do not see why, if a man transfer a debt due to him, *whatever it is*, that transfer should not be good in law. I cannot see that the authorities cited support the proposition that the debt must be ascertained in amount. The *fact* of a debt being due must be ascertained, but not the *amount*. There is, certainly, a dictum in *Fairlie* v. *Denton* going to the extent contended for; but we must look at the circumstances of that case. There there was no debt due at all—so that the opinion expressed had no application, and was only a dictum—and I think that that dictum was too broad. No later case goes so far, and the case in the Law Reports, following the one in *Meeson & Welsby*, seems the other way. I do not intend to decide this point, as it is not before us; but I must not be understood as giving my adhesion to the doctrine that, to make a novation, it is necessary that the amount of the debt to be transferred should be fixed and ascertained.

Rule discharged with costs.

Attorney for the plaintiff—*A. Brown.*

Attorney for the defendant—*Slater.*

CAMPBELL *v.* THE COMMERCIAL BANKING COMPANY OF SYDNEY. (*a*)

Mortgagee and Mortgagor—Notice of Demand under Real Property Act, s. 55—Dispensation with Tender—Privy Council Appeal —Stay of Proceedings.

The defendants, being mortgagees, demanded, under s. 55 of the Real Property Act, from the plaintiff, the mortgagor, the sum of £20,029 8s. 3d. as the amount due as principal and interest on certain mortgages held by them. A letter from the defendants' attorneys, sent at the same time as the notice of demand, contained the following passage:—"We must give you distinctly to understand that such service [*i.e.*, of the notice] is entirely without prejudice to your undertaking to the bank, and to their strict legal rights thereunder. We may mention that the object of the bank, in adopting this present course, is simply for the purpose of saving time and expense which would necessarily arise if proceedings in equity were resorted to with a view of compelling specific performance of your undertaking with the bank." The plaintiff, in a letter to the bank, acknowledging the receipt of the notice, denied his indebtedness in any larger amount than £4500, and said, with

(*a*) June 21.

reference to that sum, "I will immediately arrange for the payment of the balance; I will pay all the money secured by the three different mortgages." His letter was not answered by the defendants.

Held, that these facts did not amount to a dispensation by the defendants with a tender by the plaintiff of the amount actually due on the mortgages, assuming that the claim for £20,029 8s. 3d. was an excessive demand.

Held, also, that a demand of more than was actually due on the mortgages did not vitiate the notice under the Real Property Act (26 Vic., No. 9, s. 55).

Per HARGRAVE, J.: If the owner of different estates mortgage them to the same person, the mortgagee may insist that one security shall not be redeemed alone, but may demand the amount due on all the securities.

On a motion for leave to appeal to the Privy Council from a rule absolute for a new trial, the Court stayed all proceedings under the rule for 12 months.

DECLARATION. That the plaintiff was, under the provisions of the Real Property Act, registered as the proprietor of an estate in fee simple in certain parcels of land subject to a mortgage for £3500, and afterwards mortgaged the same property, in the form prescribed by the Real Property Act, to the defendants to secure £5000 and interest at 9 per cent. Second mortgage by the plaintiff to the defendants to secure £1000 and further advances, with interest according to the then current rate. Transfer of the original mortgage for £3500 to the defendants. Default by the plaintiff in payment of the principal and interest secured by the three memorandums of mortgage. Averments—"That on and after such default he became and was, under the provisions of the Real Property Act, entitled to notice in writing from the defendants to pay the money then due or owing on the said memorandums of mortgage, and that there should be default on the plaintiff's part to pay the said money so then due or owing, before the defendants could sell the land mortgaged to the defendants by the said memorandums of mortgage, or to the plaintiff's estate or interest therein, and before the defendants could transfer by any memorandum of transfer the said lands, or the plaintiff's estate or interest therein, to any purchaser upon any such sale as aforesaid. And all conditions were fulfilled, &c., to entitle the plaintiff to have such notice, and to be allowed to pay the money then actually due to the defendants on the said memorandum of mortgage before the defendants should proceed to, or, in fact, sell the lands so mortgaged to them, or the estate or interest of the plaintiff therein, and to maintain this action for the neglect and refusal of the defendants to give such notice and to receive the said money, and the breach of this duty on the part of the defendants hereinafter mentioned. Yet the defendants did not give to the plaintiff such notice as required by the Real Property Act, and to which he was so entitled as in such Act provided; but, on the contrary, the defendants gave to the plaintiff a notice, purporting to be according

to the provisions in that behalf of the Real Property Act, by which the defendants demanded the payment to them by the plaintiff of an amount of money much larger than the amount then due to the defendants on the said memorandum of mortgage; and the defendants, after giving such notice, refused to receive from the plaintiff, in discharge of the said memorandum of mortgage, or any or either of them, the amount of principal and interest which was then actually due on the said memorandums, although the plaintiff was ready and willing, and offered, to pay to the defendants the said amount so then due on the said memorandums of mortgage; and the defendants insisted upon the payment of the amount so as aforesaid claimed by them in their said notice, and which was far in excess of the amount then really due on the said memorandums of mortgage. And, because the plaintiff would not pay the said larger sums, the defendants, in part alleged exercise of their powers in that behalf, proceeded to, and did, in fact, sell the said parcels of land, and the plaintiff's estate and interest therein, to one John Struth, purporting and pretending to act in the matter of such sale under the provisions of the Real Property Act; and gave to the said John Struth the defendants' receipt in writing for the purchase money of the said hereditaments, paid by the said John Struth; and the defendants, after the making of such sale by their proper officer in that behalf, made a statutory declaration, purporting to be made in pursuance of the provisions in that behalf of the Real Property Act, in which the defendants falsely alleged that a month's notice in writing was given to the plaintiff to pay the money then due and owing on the said respective memorandums of mortgage; and, by means of such declaration, induced the Registrar-General to register a memorandum of transfer executed by the defendants for the purpose of the said sale; whereupon the estate and interest of the plaintiff in the said firstly and thirdly hereinbefore mentioned parcels of land passed to and vested in the said purchaser. Whereby the plaintiff has lost and been deprived of the said lands, so as aforesaid sold by the defendants, and his estate and interest therein, and the gains and profits which he would have made from the same, and the advantage he would have had from having possession of the same, and being able to carry on his business thereon, and has been put to and incurred costs and expenses in endeavouring to establish his right to the said estate and interest which he had in the said lands previously to such sale and transfer as aforesaid, and has been otherwise greatly damnified in respect of the loss of the said lands." £10,000 were claimed.

PLEAS. 1. Not guilty. 2. That the defendants did give to the plaintiff such notice as was required by the Real Property

Act. 3. That they did not dispense with the tender by the plaintiff of the amount of principal and interest which was then actually due on the said memorandum of mortgage as alleged. 4. That the said sale in the declaration mentioned took place by the leave and license of the plaintiff.

In the first instance the defendants demurred to the declaration on the ground that it did not allege any tender by the plaintiff of the amount actually due on the mortgages. The Court held that the declaration was good, as it sufficiently alleged a dispensation by the defendants with a tender by the plaintiff; and a plea of the defendants, traversing a tender, was held bad. Leave was given to the defendants to amend, and the plea traversing the alleged dispensation with a tender was added.

The action came on for trial in February last before *Faucett*, J., and a jury, and a verdict was given for the plaintiff with £3000 damages. *M. H. Stephen*, on the 13th March, obtained a rule *nisi* for a new trial on the grounds: 1. That the learned Judge ought to have told the jury that there was no evidence of a dispensation by the defendants with a tender by the plaintiff of the amount actually due by him; 2. That the verdict was against evidence and the weight of evidence; 3. That the learned Judge ought to have told the jury that it was immaterial what amount was mentioned in the notice of demand dated the 24th day of December, 1872, and ought not to have told the jury, as he did, that the notice was bad if given for an amount unreasonably in excess of what was actually due from the plaintiff to the defendants.

The evidence at the trial was very voluminous, and involved intricate accounts between the parties, extending over some years. For the purposes of the following decision, which was confined entirely to two issues—whether the notice under the Real Property Act, assuming that the jury were right in finding that it claimed more than was actually due, was bad; and whether there had been a dispensation by the defendants with the plaintiff's tender—the material evidence may be shortly stated. The plaintiff, being the owner of three properties, which were registered under the Real Property Act, mortgaged them, subject to a prior mortgage, to the bank by a memorandum, in the form prescribed by the Real Property Act, to secure £5000 and interest. Afterwards he executed a further charge for £1000 and further advances, and the original mortgage of the 16th October, 1864, was transferred to the bank, who thus became possessed of all the securities. Default having been made in payment of the amounts secured, the bank obtained judgments against the plaintiff on his promissory notes, and the plaintiff's interest in the properties was

offered for sale by the sheriff under a *fi. fa.* At the request of the plaintiff, who desired that the properties might not be sacrificed by a forced sale, they were withdrawn and placed in the hands of Messrs. Richardson and Wrench, auctioneers, for private sale, the plaintiff engaging to execute all necessary conveyances. After some further negotiations the plaintiff signed a document, agreeing to release his equity of redemption in the properties mortgaged to the defendants, "and, when required, to execute any deeds or documents necessary for effecting such release, transfer, and surrender." The wharf property (one of those mortgaged) was afterwards sold by Richardson and Wrench to Mr. Struth. The plaintiff, when called upon, refused to join in the conveyance. The defendants then proceeded upon their rights as mortgagees under the Real Property Act, and sent a written notice to the plaintiff as follows:—

"In terms of the 55th section of the Real Property Act, 26 Vic., No. 9, I hereby give you notice that I do demand on behalf of the Commercial Banking Company of Sydney the immediate payment by you of the sum of £20,029 8s. 3d., being the amount of principal and interest moneys now due and owing by you to the said bank under and by virtue of a certain memo. of mortgage, &c. [setting out the memorandums of mortgage before mentioned]. And I further give you notice that unless the said sum of £20,029 8s. 3d. be paid to the bank at the expiration of one calendar month from the date of the service of this notice on you, the said bank will, as the law directs, proceed to sell the lands, hereditaments, and premises above mentioned or referred to, and comprised in the three several memorandums of mortgage, in pursuance and exercise of the power for such purposes reserved to the said bank by the said Act, and of all other powers in any wise enabling the said bank in that behalf."

This notice was signed by the acting manager, and was accompanied by a letter from the bank's solicitors, Messrs. Want, Johnson, and Want, in the following terms:—"Referring to the undertaking you gave the Commercial Bank on the 16th of June, 1871, to execute, when required, any deeds or documents necessary for effecting a release of your equity of redemption of the mortgaged property in favour of the bank, and your refusal to comply with the terms of such undertaking, the bank have decided to give you notice, in pursuance of the provisions of the Real Property Act, demanding payment of the amounts of principal and interest moneys due and owing by you under your mortgages to the bank, and also further notice of their intention to proceed to a sale of the mortgaged property, if such principal

and interest moneys are not paid within the time prescribed under the Act. Our clerk, Mr. Maddock, will serve you with the notice before referred to. At the same time we must give you distinctly to understand that such service is entirely without prejudice to your undertaking to the bank, and to their strict legal rights thereunder. We may mention that the object of the bank in adopting this present course is simply for the purpose of saving time and expense, which would necessarily arise, if proceedings in equity were resorted to with a view of compelling specific performance of your undertaking with the bank. We almost omitted to inform you that the bank will hold you responsible for any loss or damage they may sustain in consequence of your refusal to comply with the spirit and letter of your undertaking."

The following reply (omitting portions which refer only to collateral matters) was sent by the plaintiff to the defendants' manager:—"I am in receipt of your notice claiming £20,000 from me.....Your notice cannot possibly be in accordance with the Real Property Act. The provisions of that Act enable a mortgagor to redeem his property by paying within a given time the amount for which a mortgage was given. When Mr. Anderson and myself purchased the Commercial Wharf, we gave a mortgage to Allen and Mitchell for a portion of the purchase money—£3500. This mortgage, I understand, has fallen into the hands of your bank. I am willing, and I hereby offer to pay the amount, as I told your solicitor some time ago, at any moment. It is quite separate from, and has nothing to do with, any other matters between the bank and me. But, going further, I am willing to do more. I will pay all the money secured by the three different mortgages on the Commercial Wharf; and you cannot ask or enforce anything more.....The total amount therefore secured is £9500. To be deducted from that is the value of Little Coogee Bay, which cost me £3000, sold by you; and the income derived from the wharf for the first year and a-half, which, according to your own representations, must have exceeded £2000. Deduct the above two amounts from the £9500, and I will immediately arrange for the payment of the balance. The mortgages themselves will prove that the amounts above stated are correct....."

No notice was taken by the defendants of this letter. A declaration was afterwards made, stating a demand of the amounts due on the mortgages, and non-payment, and the Registrar-General completed the transfer to Struth, who then became the registered proprietor. It also appeared at the trial that before the notice of demand was sent to the plaintiff he was

told by a clerk of the defendants' attorneys that the wharf property had actually been sold to Mr. Struth.

M. H. Stephen, *Darley*, *Owen*, and Sir *G. Innes*, for the defendants in support of the rule. The notice is perfectly good. *Humphery* v. *Roberts* (*b*) is an analogous case. There the same point arose with reference to a demand under a power of sale in a mortgage, and it was held that the claim of a larger amount than was due did not vitiate the demand. As to the dispensation, *Alderson*, B., says in *Scarfe* v. *Morgan* (*c*): "It seems to me you cannot say that, because the party claims more than it may be ultimately found he had a right to, he would not have a right to a tender of the sum which the other ought to pay." This case is not like *Cort* v. *The Ambergate Railway Company* (*d*), or *Ex parte Danks* (*e*), which will be relied upon by the other side. There there was an express refusal to accept, in the one case, the goods, in the other, the money. Here there was nothing in the least approaching to a refusal on the part of the bank. *Thomas* v. *Evans* (*f*) shews that, to dispense with a tender, there must be either the express declaration or equivalent act of the creditor. Besides, the principle of the consolidation of securities applies here (*g*). If the owner of different estates mortgages them to one person separately for distinct debts, or the same debt with further advances, the mortgagee may insist that one security shall not be redeemed alone: *Fisher on Mortgages* (*h*); *Shuttleworth* v. *Laycock* (*i*); *Pope* v. *Onslow* (*j*); *Vint* v. *Padgett* (*k*); *Tassell* v. *Smith* (*l*). The whole amount of £20,000 was admittedly due on one of the properties, and the bank had therefore a right to demand the whole sum. The plaintiff could not have redeemed without tendering the £20,000. This does away with the plaintiff's whole cause of action, for the bank's demand was a perfectly proper one.

Butler, Q.C., and *Davis* shew cause. We admit the authorities cited, but say that, under all the circumstances of this case, there was a dispensation by the defendants with a tender by the plaintiff. The case of the *Norway* (*m*) is a direct authority in our favour. The judgment of *Knight-Bruce*, L.J., goes as far as anything we are contending for. The evidence shews that the bank had actually sold, and that a tender would have been of no use. Want and Johnson's letter clearly intimates that the defendants considered themselves the absolute owners of the property. That

(*b*) 5 S.C.R. 376. (*c*) 4 M. & W. 282. (*d*) 17 Q.B. 127. (*e*) 2 D.G., Mac., & G. 936. (*f*) 10 East 101. (*g*) This point was argued by *Owen* by leave of the Court, *Butler* objecting that the point was not taken in the rule *nisi*. (*h*) p. 630; 3rd ed. (*i*) 1 Vern. 245. (*j*) 2 Vern. 286. (*k*) 2 D.G. & J. 611. (*l*) 2 D G. & J. 713. (*m*) 3 Moos. P.C. 245.

letter was tantamount to an announcement that they only gave the notice as a formal matter, not intending or expecting it to be acted upon, and that they reserved their rights under the previous agreement. It was "an act of the creditor equivalent to an express declaration," in the terms of *Thomas* v. *Evans*. We do not say that the *mere demand* of more than was due amounted to a dispensation with a tender, and *Scarfe* v. *Morgan* has nothing to do with this case. We contend that the notice must be taken in connection with the other circumstances which were before the jury. Besides, the construction of the documents may be a question for the Court; but the conduct of the defendants, and the question whether their conduct amounted to a dispensation, was for the jury. In *Davison* v. *Dignam* (*n*) it was held that the plaintiff, by taking the ground that no debt was due at all, waived his right to a reasonable time for paying. So here the bank having claimed this enormous sum, waived their right to a tender of what was really due. We contend that the notice was bad altogether; but, even if the defendants are right as to that, we rely on the dispensation. If the Court is of opinion that there was a dispensation, the question of notice becomes immaterial. The principle of the consolidation of securities has nothing to do with this case. That only holds when a bill to redeem has been filed; and it is based upon the rule that a person seeking equity must do equity. Here we are only dealing with the rights of these parties at law. They are only governed in this Court by their statutory obligations, and we cannot consider their equitable rights. *Baker* v. *Gray* (*o*) shews that consolidation is an equity depending on the equity to redeem, and explains some of the cases cited on the other side.

Stephen, in reply. The *Norway* is a much stronger case than this; there there was a direct refusal to accept the money if it were tendered. If it is admitted that the demand was a good notice under the Real Property Act, there has been no breach of duty on the part of the defendants in selling, and the plaintiff's cause of action fails. It is said that the bank did not expect or wish the demand to be complied with. But how does that appear? The bank had an agreement with Struth which relieved them from any liability to him if they were prevented from completing the sale. They had no interest in pressing on the sale if they could have got their money from Campbell.

Sir JAMES MARTIN, C.J. In this case the plaintiff was mortgagor and the defendants were mortgagees of land which had been brought under the Real Property Act, 26 Vic., No. 9. In reference to property brought under that Act it is provided by

(*n*) 7 S. C. R. 115. (*o*) L. R. 1 Ch. Div. 491.

section 55 that a mortgagee may, after default, sell and transfer the property on giving a certain notice. The section is intended as a substitute for the ordinary clause in mortgages by deed giving the mortgagee a power of sale. By section 56 a person buying from a mortgagee selling in this way has a good title, whether the requirements of section 55 as to notice are complied with, or not; in the same way as a purchaser under the ordinary power of sale in a mortgage deed is not required to see whether the power has been rightly exercised. It follows from these provisions that, although the mortgagee may not comply with the terms of section 55 as to notice, he may yet convey a good title to a purchaser, and the only remedy of the mortgagor will be an action against the mortgagee for proceeding to a sale in violation of section 55.

Now, it is alleged in the declaration in this action that the relationship of mortgagor and mortgagee of a property under this Act existed between the parties; that default was made; that the defendants gave notice of their intention to sell, making at the same time a demand of a much larger sum than was actually due; that after that, although the plaintiff was ready and willing and offered to pay what was really due, the defendants went on and sold the property, and caused a transfer to be made under the Act, by which the plaintiff lost his property and sustained damage. That is the cause of action. Two things are mentioned in the declaration: first, a demand in the notice of more than was due; secondly, a refusal to accept what was due, notwithstanding the plaintiff's readiness and willingness to pay. It is plain that an action will lie for either of these two things. If the plaintiff had sued only for proceeding to sale without due notice, there would have been no necessity to inquire into the question whether a tender ought to have been made or had been dispensed with—it would have been wholly immaterial. But the plaintiff here has put both causes of action in his declaration, and it seems to me that his readiness and willingness to pay, and the defendant's refusal to accept, and not the nature of the demand in the notice, are the real cause of action set up in the declaration. But, in point of fact, issue was taken on both allegations; both issues went to the jury; and we have to decide upon both.

There are two questions for this Court: first, whether there was a proper notice under s. 55; secondly, whether there was a dispensation, on the part of the defendants, with a tender by the plaintiff. The question of dispensation of tender arose in this way. There was no allegation of a tender by the plaintiff in the declaration, but there was an allegation that although the plaintiff was ready and willing to pay the amount due, the defendants refused to accept it. This Court, on demurrer, held that those

statements were equivalent to an allegation that a tender had been dispensed with by the defendants. The defendants then pleaded that there was no dispensation of tender, taking issue upon what this Court had decided to be the legal effect of the statements in the declaration.

This rule was granted on three grounds. The first was that the verdict was against evidence; but it was limited to the finding of the jury upon these two issues. In the other two grounds exception is taken to his Honor's ruling because he did not tell the jury that there was no evidence in support of the plaintiff's case on these issues. It will be sufficient to dispose of the case upon the question whether the verdict was against evidence. I am of opinion that the verdict was against evidence on both these points. It is plain that where a demand is made by a mortgagee, the demand is not bad merely because it asks for a larger sum than is due. That is clear from a number of cases that have been cited. The notice followed the terms of the section of the Real Property Act. [His Honor read the notice.] It concludes with an intimation that unless the money demanded as principal and interest were forthwith paid, the bank would proceed to sell. Now it is said that nothing like the amount claimed was due. I am of opinion that that does not matter, and my opinion is founded on *Humphery* v. *Roberts* and other cases cited in argument. It seems to me that the demand was a perfectly good one, although it may have been for a larger amount than the plaintiff was bound to pay.

I am further of opinion that this issue was immaterial, as the plaintiff went on to state in his declaration that he was ready and willing to pay what was really due, but the defendants refused to accept it. His readiness and willingness and the defendants' refusal appear to me to be the real cause of action, because, if the defendants had refused, his action against them would have been good whether there had been any demand at all or not. I pass, therefore, from the first point to that which is the real matter of contention between these parties.

It appears to me that the demand of a larger amount does not dispense with the tender of a smaller amount, unless it is accompanied by a clear intimation that a smaller amount will not be received. It is said that there is such an intimation in this case. There is nothing of the kind in the notice itself; but the notice was accompanied by a letter from the bank's solicitors, explaining the reason why the notice was given. It appears that, antecedently to this period, a judgment had been obtained against the plaintiff by the defendants, by virtue of which the property in question in this action was advertised for sale by the sheriff.

The plaintiff intimated to the defendants that the property would realise a higher price if put into the hands of an auctioneer for private sale. The defendants acceded to that proposal, and, with the assent of both parties, it was given to Richardson and Wrench, who afterwards entered into a contract with a purchaser. There had before that been an agreement between the plaintiff and the defendants, by which he agreed to give up the property altogether to them, he taking a certain other property which was also mortgaged, the defendants releasing him from his debt, and he releasing all further claim on this property. The sale having been made by the auctioneers, it became necessary, in order to make a title, to obtain declarations from the plaintiff. He refused to make the acknowledgment required, and then the notice was sent with the accompanying letter. [His Honor read Messrs. Want and Johnson's letter of December, 1872.] Before I go any further I may call attention to the fact that when the case was before this Court upon demurrer, we expressed an opinion that the bank, by making this demand, receded from whatever rights they held under the agreement with the plaintiff, and fell back into their position as simple mortgagees. This letter, no doubt, is an intimation that that was not the view which they took at the time. They, no doubt, considered that they had a right to retain the whole proceeds, whatever price the property might bring. But the question that the Court has to determine is whether an intimation that they regarded their position in that light was equivalent to a distinct refusal to accept any less sum than was demanded in the accompanying notice. I am of opinion that it was not. We may in some sense infer that they probably would not have been willing to accept less than the £20,000, or that they would not have consented to be placed in any worse position than they were in under the agreement. But the question is not what their expectations were; the question is what they actually said. Did they say that they would not accept less, or anything tantamount to such an intimation? I cannot gather anything of the kind from that letter. I see not one word here which leads to the conclusion that they refused to accept anything less than the amount mentioned in the notice of demand. You cannot get at that except by imagining, supposing, inferring something. But there is no express *intimation*, and it is clear on the authorities that where a demand is made for a larger amount than is really due, it does not do away with the necessity for making a tender for the amount actually due, unless there is at the same time an actual refusal to receive less. In the words used in the case of the *Norway*, I do not see anything in this letter which "amounted to an

announcement that it was useless to tender any smaller sum, for that, if tendered, it would be refused." There was no other evidence at the trial of anything said or done by the defendants after this demand. It has been said that the evidence on this issue was a matter for the jury. No doubt this issue, like all issues of fact, was for the jury. No application was made to his Honor, before whom this case was tried, to nonsuit the plaintiff on the ground that there was no evidence, and that being so, no other course was left to his Honor but to put it to the jury. But the question for this Court, when a particular verdict is found, and it comes on for consideration afterwards in the usual way, is whether there was any evidence (not a mere *scintilla*, but any substantial evidence) to support the verdict. It appears to me that this letter does not amount to evidence of a dispensation by the defendants with a tender by the plaintiff of the amount due upon his mortgages. The jury have found that there was a dispensation, and it appears to me that they came to that conclusion without evidence. That being my opinion, I think this rule ought to be made absolute.

HARGRAVE, J. I concur with his Honor in thinking that this rule should be made absolute. I think there was an absence of evidence to shew that there was a dispensation by the defendants with a tender by the plaintiff, as the documents referred to do not seem to me sufficient evidence of a dispensation. At the same time it is with great reluctance that I concur in granting a new trial, because the investigation lasted seven days, and the matters of account between these parties were gone into at great length. All these accounts were before the jury, who, as mercantile men, were well fitted to deal with them. There was a thorough and full investigation, and I would not interfere with the verdict of the jury if I could help it. This was what I felt on the motion for a rule *nisi*, and I was, therefore, disinclined to grant a rule. But now it seems to me, after hearing the matter fully argued, that the jury, in consequence of the intricate nature of the accounts, arrived at a wrong conclusion. I have been very much struck by Mr. *Owen's* argument, that the well-known equitable principle of the consolidation of securities applies in this case. If different properties are mortgaged to the same person, he has a right to refuse to allow any one of the mortgages to be redeemed unless the mortgagee redeems all of them. Here there was no appropriation of securities to the different debts; and my idea of the rights of bankers is that they have a right to retain all the securities until the whole of their claim is satisfied. If that argument had been put before us upon the motion for a rule *nisi* my decision would have been different; but that point was not

then taken. I think, too, that a person who owes money upon a mortgage and wishes to redeem, ought to protect his rights by express and unambiguous acts. My notion of the present state of the law is that a mortgagor ought to shew clearly that he is prepared to pay all the money that is actually due upon the mortgages. We ought to consider the effects of our decisions upon credit and property in this community, and I think we should be doing mischief if we threw any doubt on the right of mortgagees to enforce all their securities. I am quite clear that, on all the facts of the case, that question was not put distinctly enough before the jury, and there ought, therefore, to be a new trial. The verdict, too, was for a very large amount—£3000; and that is an additional reason for sending down the case for further consideration by another jury.

FAUCETT, J. I have had some difficulty in coming to a conclusion in this case. Indeed, at the trial, I thought the case was full of difficulties. I did not think that the plaintiff, in justice, ought to have succeeded. It certainly seemed a very hard case for the bank; for this reason, that nearly the whole of the £20,000 was unquestionably due. There was the acknowledgment of the plaintiff himself, under his hand and seal, after a very close investigation into the accounts by himself and the secretary of the bank, that £18,000 were due. Under these circumstances an agreement was entered into, and a portion of the property mortgaged to the bank was actually handed over to Campbell, leaving the rest in the possession of the bank. He was then asked to perform his part of the agreement, and he refused. At that time there was no prospect whatever of his paying or being able to pay. The bank then tried to sell, having complied with Campbell's own request to sell by private sale through Richardson and Wrench. They sold privately to Struth, and Campbell, being asked to perform certain necessary things to complete the sale, refused. He lay by and refused to comply with the demands of the bank, or to carry out the agreement he had made, and for which he had actually received a portion of the consideration. Under these circumstances, the bank, as I believe, and as the evidence shewed, thinking that Campbell was unable to pay, took this course, which may or may not have been a fortunate one, accompanying it by a difficulty caused by themselves. There would have been no difficulty if there had been a simple notice by itself. The demand may have been largely in excess of the amount really due; still, it would have been the duty of Campbell to have gone to the bank, complained of the largeness of the amount, asked them to ascertain the correct amount, and, when the amount was ascertained, to have tendered the proper sum.

It turned out that there was a special agreement between the bank and Struth, that if the contract for a sale could not be carried out, the bank could recede from it. In such a case as this the law is that, even if the bank could not have completed the sale, they would not have been liable in substantial damages to Struth. They would only have been bound to pay him the expenses of investigating the title. But this question did not arise, as they got rid of it by express agreement. Under these circumstances Campbell wrote the letter that has been commented on, offering—what? Not to pay the amount due, but offering to pay an amount which he himself calculated and told the bank was due—some £5,200. It turned out that that amount was largely under what was actually shewn to be due at the trial. But he did not really offer to pay it; he only said that he would be willing. There was nothing whatever in that letter amounting to a tender. When Campbell had three courses open to him, he did not pursue any one of them. He might have tendered: he did not tender. He might have gone into a Court of Equity: and then the Court would have heard him only on condition that he brought into Court the sum really due. There was still a third course. He might have gone into the Real Property Office and lodged a caveat against the transfer to Struth, shewing that he was ready to pay the money due upon the mortgage. It struck me as a hard case, that when Campbell took none of these courses, he should afterwards come forward and complain of the action of the bank. Of course, notwithstanding that, if the verdict of the jury was right we cannot help the hardship.

The first question for us now is—is the notice a good notice? I concur with their Honors in thinking that a demand for a larger sum than was actually due does not vitiate the demand. I put that to the jury very strongly at the trial. I told them that even if the demand were *excessively* large, the notice would still be good. But at the end of my summing up some observation was made that elicited a remark from me to this effect—that if the sum demanded was so *absurdly* or so *extravagantly* large that a person would not think it was intended as a demand at all, that might make the notice bad. I am not even now prepared to say that the direction was wrong; but in any case I do not think that, taken with the whole of my summing up, it could have misled the jury.

But I did not, and I do not now, think that that was the substantial question before the jury. I think the real question was whether there had been any dispensation with a tender. That was a point that I felt bound to put to the jury. According to the arguments used now, I ought to have been asked to nonsuit

the plaintiff; but I was not. Still I put the matter as strongly as I possibly could to the jury. I confess I thought for some time that there was something in Want and Johnson's letter that was calculated to lead Campbell to suppose that it was never intended that he should pay the money; and I think so still. There are some statements which shew that the bank never expected the money to be paid or a tender to be made. But was that a waiver of a tender? I think that it was not; and on that ground I concur with their Honors in granting a new trial.

Rule absolute with costs.

Attorneys for the plaintiff—*Rolin & Salter.*
Attorneys for the defendants—*Want, Johnson, & Want.*

Butler, Q.C., and *Davis*, on the part of the plaintiff, moved for leave to appeal to Her Majesty in Council from the rule granting the new trial, and asked the Court to stay all proceedings in the action pending the appeal, on the ground that the plaintiff might otherwise be compelled to go down to trial, while the decision of the Court remained unreversed. In that case he would certainly be nonsuited and would have to pay the costs of the trial, whatever the judgment of the Privy Council might afterwards turn out to be.

M. H. Stephen and *Darley*, for the defendants, objected; and contended that the Court would follow the general rule and carry out their own judgment.

PER CURIAM. We order that all proceedings under our order granting the new trial be stayed for twelve months from the present time.

IN THE MATTER OF AN ARBITRATION BETWEEN ALFRED BURNE AND JOHN KAVANAGH. (*a*)

Arbitration—Umpire sitting with arbitrators—No award as to costs—Attachment—Sending back award—31 *Vic., No.* 15.

A submission to arbitration directed that the costs of the submission, reference, and award should be in the discretion of the arbitrators, "who may award by whom, to whom, and in what manner the same shall be paid." An award was made which was silent as to costs. *Held*, on motion for a *fi. fa.* and an attachment for disobedience of the award, that the omission of the costs invalidated the award. *Re Warby and Rose* followed.

(*a*) June 19.

But the Court (following *Morgan* v. *Smith*), upon an undertaking by the applicant to pay all the costs of the submission, reference, and award, made the rule absolute for a *fi. fa.*, and ordered the respondent to comply with the terms of the award.

It is not competent to the Court, upon a motion for an attachment, to remit the award to the arbitrators under the power given by 31 Vic., No. 15, s. 16

By the submission the disputes were referred to two arbitrators, "or in case the arbitrators cannot agree in their award," then to an umpire. The award stated that the arbitrators had agreed to their award, "after full consideration of the matter in reference in the presence of and with the assistance of" the umpire; and the umpire signed the award as witness to the signatures of the arbitrators. *Held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dissentiente*), that these facts did not invalidate the award.

The differences and disputes referred by the submission were stated to be "respecting the said partnership and the accounts thereof, and as to what amount A. B. is entitled to be paid for his interest in the partnership assets, and for money claimed to be due to him upon his withdrawal from the said partnership." The parties covenanted "to do and execute all such acts and deeds, matters and things, and to pay all such moneys," as the arbitrators, by their award, should direct and appoint. The award ordered the respondent *inter alia* to give a bill of sale over his stock-in-trade as a pawnbroker to secure the performance of the award. *Held*, that the ordering of such a security was not beyond the powers of the arbitrators.

Held, also (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.), that, though it is necessary, in order to found a motion for an attachment, that there should be an express order to pay the money, the same rule does not hold upon an application for a *fi. fa.* under the Act 5 Vic., No. 9, s. 43; but it may issue upon the *decision* of the arbitrators that a sum is due.

MOTION to make absolute a rule calling upon John Kavanagh to shew cause why a writ of *fi. fa.* should not issue to recover the sum of £300 awarded to be paid by the said John Kavanagh to Alfred Burne, and why a writ of attachment should not issue against the said John Kavanagh for the non-acceptance of two bills of exchange, and for the non-execution of a bill of sale over the stock-in-trade, book-assets, and household furniture of the said John Kavanagh, by way of security for the due performance of a certain award. The rule was granted on the ground that the said John Kavanagh had not complied with the terms of the award, or any part thereof, though a demand had been made.

The submission to arbitration recited that the parties (Alfred Burne and John Kavanagh) had carried on business in partnership as pawnbrokers; that the partnership had been put an end to, and that differences and disputes had arisen "respecting the said partnership and the accounts thereof, and as to what amount the said Alfred Burne is entitled to be paid for his interest in the partnership assets, and for money claimed to be due to him upon his withdrawal from the said partnership." It was then agreed to refer these "differences, disputes, and questions to the final award and determination" of two arbitrators, "or, in case the said arbitrators cannot agree in their award, then to the final

award and determination of such umpire" as the arbitrators should appoint before entering upon the arbitration. There were covenants by each party "to well and truly abide by, obey, observe, fulfil, and keep the award of the said arbitrators, or of the said umpire, as the case may be, which they or he shall make of and concerning the matters hereby to them referred, and respecting the costs of the said reference and award under the same," and to "do and execute all such acts and deeds, matters and things, and pay all such moneys as the said arbitrators or the said umpire shall by their or his said award direct or appoint." A time was limited for the making of the award, and there were other provisions applicable in the event of a disagreement between the arbitrators. It was also provided that "the costs of this submission and of the said reference and award shall be in the discretion of the said arbitrators or umpire, who may award by whom, to whom, and in what manner the same shall be paid." The submission contained other usual clauses upon which no question turns. It was executed by both parties and made a rule of Court.

The award was in the following terms:—

"Award in arbitration, made the 19th day of May, 1877, sheweth: that, upon full consideration of the matter in reference in presence of and with the assistance of the umpire (Mr. James Green) the arbitrators agree that Mr. Alfred Burne, of Sydney, dentist, is entitled to receive from Mr. John Kavanagh, of Sydney, pawnbroker, the sum of £587 11s. 3d. as full consideration for his half share in the business lately carried on between him and the said John Kavanagh; also that the above award be paid in the following manner, viz.:—£300 net cash on or before the 30th instant; a bill to be given for £107 10s., dating from 1st of June proximo and payable on 1st of December; another bill for £208, dating from 1st of June proximo, and payable on the 1st of March, 1878 (these amounts inclusive of interest); and also that security for the due performance of this award be taken from Mr. John Kavanagh on stock-in-trade, book-assets, and household furniture, the said books and stock to be open for inspection of Mr. Alfred Burne, or his authorised representative, during business hours. Given under our hands this 19th day of May, 1877.

"Witness— "Hugh Lockrey
"James Green." "Richard Chandler } Arbitrators."

A demand had been duly made, but Kavanagh had neither paid the money nor given the securities.

Salomons, in support of the rule. Here is a valid award under a submission which has been made a rule of Court. It has not

been complied with, and the applicant is entitled to the *fi. fa.* and attachment.

W. H. Cooper shews cause. There are five answers to this application. 1. The award does not order the payment of money. The arbitrators only "agree" that the amount be paid. There must be an express order to pay the money, or an attachment will not issue: *Seaward* v. *Howey* (*b*); *Edgell* v. *Dallimore* (*c*); *ex parte Greville* (*d*). The Court may order payment; but we have come here to resist an attachment. A *fi. fa.* stands upon the same footing as an attachment. 2. The award prescribes what the arbitrators had no power to order. They had no authority to direct the giving of a bill of sale. 3. The award is incomplete, in being silent as to costs. This omission makes the award bad: *Richardson* v. *Worsley* (*e*); *Randall* v. *Randall* (*f*); *Re Warby and Rose* (*g*). 4. The award was virtually made by the arbitrators and umpire together. The arbitrators could only call in the umpire when they disagreed; but the award shews that he was present all the time, and was consulted. *Heatherington* v. *Robinson* (*h*) is the converse case; there the arbitrators awarded without the umpire, contrary to the terms of the submission, and the award was held bad. To justify the umpire in interfering, there must have been a disagreement between the arbitrators: *Cudliff* v. *Walters* (*i*). *Salkeld* v. *Slater* (*j*) shews that he must begin the hearing of the case *de novo*. An award in which both arbitrators and umpire join is bad: *Tollit* v. *Saunders* (*k*). 5. Even if the defects, apparent on the face of the award, are not sufficiently clear to induce the Court to set it aside, still, if the validity of the award be doubtful, the Court will not grant an attachment: *Wrightson* v. *Bywater* (*l*); *Randall* v. *Randall*.

Salomons, in reply. The cases cited on the other side have no application to the facts here. There is no authority to be found that shews that the fact of an umpire sitting with the arbitrators invalidates the award. On the contrary, in *Winteringham* v. *Robinson* (*m*) the arbitrators and umpire sat together, and the award was held good. This is not the award of the arbitrators and umpire together, but of the arbitrators alone. They consulted the umpire just as they might have consulted any one else. As to the failure to award costs, we can agree, as one of the parties did in *Morgan* v. *Smith* (*n*), to pay the whole costs of the reference and award so that the other party cannot possibly be damnified.

Cur. adv. vult.

(*b*) 7 Dowl. 318. (*c*) 3 Bing. 634. (*d*) 8 S. C. R. 27. (*e*) 5 Ex. 513. (*f*) 7 East 80. (*g*) 4 S. C. R. 302. (*h*) 7 Dowl. 192. (*i*) 2 Moo. & Rob. 232. (*j*) 12 A. & E. 767. (*k*) 9 Price 612. (*l*) 3 M. & W. 199. (*m*) 27 L. J. Ex. 301. (*n*) 1 Dowl. N. S. 617.

Sir JAMES MARTIN, C.J. (*o*). An award was made in this case, ordering the payment of a sum of money by one party to the other, and further ordering the payment of another sum by promissory notes, and the giving of security. The submission to arbitration was in the ordinary form, and referred all the matters in dispute between two parties who had been in partnership together. An application is now made for a writ of *fieri facias* to enforce that part of the award which orders the payment of money, and for a writ of attachment in respect of so much as directs the giving of the promissory notes and the security. This application is resisted on four grounds: 1. That the award is not a final disposition of all the matters submitted, inasmuch as nothing is said about the payment of the costs; 2. That the arbitrators exceeded their power in ordering a bill of sale to be given as security; 3. That the award contains no order for payment, but a mere finding that a particular sum is due; and that, therefore, no attachment (or *fi. fa.*, which has been substituted for an attachment in this colony) can be granted; and 4. That the arbitrators and umpire sat together, and that this vitiates the whole proceeding.

Taking the last ground first, I am of opinion that the statement in the award that the arbitrators had arrived at their decision "after full consideration of the matters in reference in the presence of and with the assistance of the umpire," does not make the award in any way bad. During the argument an authority was referred to, which deals with the converse case. There the umpire took the arbitrators into consultation after they had disagreed. It was held that that fact alone would not make the award bad. In that case (*Soulsby* v. *Hodgson*) (*p*), and also in *Beck* v. *Sargent* (*q*), it was said that the award was in law the award of the umpire, and that he was at liberty to take what advice, or opinion, or assessors, he pleased. I think the principle on which those cases were decided applies here. The umpire had no power whatever to interfere until the arbitrators had disagreed, and was a mere stranger. The award was made after consulting him; but the arbitrators were at perfect liberty to consult him, or any person they pleased (a professional man, for instance); and the award is, to all intents and purposes, their award, and not the award of the umpire.

As to the second objection—it is twofold. The arbitrators, it is said, had no power to direct any security at all to be given; but, if they had, they had no power to direct this particular kind of security. It appears that the respondent is a pawnbroker, and it is contended on his behalf that he is not entitled to give a bill of sale over his stock-in-trade, consisting of pledges deposited

(*o*) June 22. (*p*) 3 Burr. 1474. (*q*) 4 Taunt. 232.

with him of which he has no power of disposing. There are numerous cases to shew that arbitrators may not only award the amount due, but may, without any special powers, fix the time and the way in which it is to be paid, and that it is clearly within the province of the arbitrators to require security to be given. And it also seems to me that this particular kind of security, a bill of sale over the interest of a pawnbroker in the goods pledged with him, could properly be given; just as a mortgagee, or the holder of a bill of sale, could mortgage his interest as a security. I therefore think that the arbitrators had power to give this particular direction.

Then it is said that the application must fail because there is no actual *order* for the payment of money. The words are—"agree that Mr. Alfred Burns, &c., is entitled to receive"; "also that the above award be paid." The question is—does this "agreement" by the arbitrators that a certain sum ought to be paid amount to an order that it shall be paid? If it had been the law that an attachment should issue for non-payment of money under an award, I should have thought that there was great force in Mr. *Cooper's* argument. An attachment used to go in this colony, and still issues in England, for a failure to comply with an order for the payment of money; and it has often been held that an attachment will only go for the disobedience of an express *order*. But now that the procedure is different, and the Court can only grant a writ of *fi. fa.*, it appears to me that the cases decided upon questions of attachment do not apply, and that the *decision* of the arbitrators that a sum ought to be paid is quite sufficient authority to this Court to enforce its payment.

This leaves one difficulty still to be disposed of. The submission contains a clause with reference to the costs, in the following terms:—"That the costs of this submission and of the said reference and award shall be in the discretion of the said arbitrators, who may award by whom, to whom, and in what manner the same shall be paid." It is contended that this clause made it obligatory on these arbitrators to make some award as to costs. Had it not been for the case of *Richardson* v. *Worsley*, to which I called the attention of counsel during the argument, I should have thought that it was not so; but I find that the words of the submission in that case were—"that the costs shall be in the discretion of the arbitrator, and shall be defrayed as he shall direct." There is no substantial difference between these words and those in the present submission. It appears, therefore, on the authority of that case, that it was obligatory on the arbitrators to award the costs. That they have not done. It is open to any one opposing a motion of this kind to contend that the award, which it is

sought to enforce, is invalid on the face of it, though he will not be allowed to shew by extrinsic evidence anything going to impeach its validity. But here the objection appears on the face of the award, and, in my opinion, is a sound objection.

There are certain cases (and it has been contended that this is one of them) where the Court can send back an award which proves to be defective in some particular to the arbitrators for their reconsideration. But that course cannot be taken in this instance. By our Arbitrations Act, 31 Vic., No. 15, s. 16, it is enacted that in every case in which an application is made to the Supreme Court to set aside an award, the Court shall have power at any time to remit such award, and the matters referred, or any of them, to the reconsideration and redetermination of the arbitrators upon such terms as the Court may think proper. But our powers with respect to our jurisdiction over awards must be considered with reference to the express words of the enactments by which they are created; and a power given in cases where an application is made to set aside an award cannot be exercised on a motion for an attachment like the present. Nor is there here, as is sometimes found, a power reserved to the Court by the parties in their submission, to send back the award. In England, by the Common Law Procedure Act of 1854, s. 8, the Courts have power to remit the matters referred at any stage of the proceedings; but, by some extraordinary oversight, the person who adopted that Act in this colony omitted that section. We, therefore, have not this most useful power possessed by the English Courts.

At first I was inclined to think that, as the objection to the award was a good one, and as we could not send the award back, the only course to pursue was to refuse the rule altogether. Such a course would have involved great expense and delay to the parties. But it seems to me now, on the authority of some cases which have been referred to, that if the party attempting to enforce the award agrees to pay the whole costs of the submission, reference, and award, then by no possibility can the other party be damnified. Mr. *Salomons* now undertakes in open Court that his client will pay these costs, and I think that that disposes of the objection. The cases cited went upon the principle that in cases of arbitration the Court has very large powers, and although the award was objected to on this ground, the objection was, under the circumstances, held not to be fatal, inasmuch as the party resisting could not be prejudiced by the defect. These costs must therefore be paid by the applicant, and their payment must be made a condition of any steps being taken to enforce the award. I think that the order ought to be for the issue of a writ of *fi. fa.* for the sum of £300, and that the respondent

Kavanagh be ordered to give the promissory notes and the bill of sale as directed in the award; and I further think that the applicant should pay the costs of this application. Mr. *Cooper* has taken a valid objection to the award, and could not have anticipated the course which has been taken. He was therefore justified in coming to the Court to resist this application. I think the justice of the case will be met if the costs, when taxed, are deducted from the £300, and the *fi. fa.* issue for the balance only.

HARGRAVE, J. The omission of the costs was clearly fatal to the award. It is one of the best established points of arbitration law that, if three matters, say, A., B., and C., are submitted, and the arbitrator leaves out C., and only decides A. and B., the award is good for nothing. If costs are referred to them, and they make no determination as to costs, then it is not a final determination of the matters in dispute, which an award ought to be. With regard to the security ordered to be given, I think that was within the terms of the submission. The parties agree to "do and execute all such deeds, matters, and things." That would include such a security as the present. With regard to the declaration in the award that the arbitrators had considered the matters referred to them with the assistance of the umpire, I think it makes the award bad. The umpire ought not to do anything which might bias him, if he should come afterwards to decide between these parties; and he ought not to interfere until the arbitrators have disagreed. I think the proceeding in this case might have had the effect of biassing the umpire's mind, and that consequently it rendered the whole proceeding void. But, under all the circumstances of the case, I concur in the order his Honor proposes to make, for the sake of doing the most complete justice between these parties. The applicant must certainly pay the costs of getting, as a favour from the Court, what he is not entitled to by law.

FAUCETT, J. I agree altogether with the *Chief Justice*. On the first point, with which his Honor dealt, I will refer to two cases which seem to place the point beyond all question. The first is *Soulsby* v. *Hodgson*. What difference can there be between the umpire consulting the arbitrators, as in that case, and the arbitrators consulting the umpire, as in this? What possible difference can it make that the arbitrators consult the umpire rather than anyone else? Then there is *Beck* v. *Sargent*. Lord *Mansfield* in his judgment says:—"As to the other point, what the arbitrators do in making the award is nothing, the award is in law the award of the umpire alone; it is no more than if mere strangers had joined in the award, which could not vitiate."

I am at a loss to understand the difference between these cases and the present; and the principle there decided appears to me, beyond all question, applicable here. As to the power of the arbitrators to direct security to be given in the way mentioned, I agree entirely with their Honors. The powers of arbitrators would be perfectly useless if we were to hold that such a direction was invalid.

One ground taken is that the award does not order the payment of the money, but the arbitrators merely "agree" that the money shall be paid. It appears to me that that is equivalent to an order. In construing awards we must look at them with the eyes of common sense, getting rid of technicalities as much as possible. If the arbitrators use language generally understood among mercantile men, it is quite sufficient.

I also agree that the omission as to the costs would have made the award bad, for the reason given by Mr. Justice *Hargrave*, that the arbitrators have not made a final determination of all the matters referred to them. But the Courts have supplied this difficulty under certain circumstances. Possibly, if Mr. *Cooper* had insisted upon this point, and the costs had not been given up by the applicant, it would have been fatal to the present application, but, now that the costs have been waived, the justice of the matter will be met by making an order by which the award may be enforced and the disputes between these parties finally settled.

Rule absolute for a fi. fa. for £300, less the costs of the submission and award, and of opposing the present application. Costs to be taxed within a week. Order that the respondent Kavanagh give the promissory notes and the bill of sale, in terms of the award.

Attorneys for applicant—*Rolin and Salter.*

Attorney for respondent—*R. W. Robberds.*

EX PARTE JONES. (*a*)

Prohibition—Aggravated assault—18 *Vic.*, *No.* 9, *s.* 1.

J. was charged before Justices with an indecent assault and an assault with intent to commit a rape. The evidence shewed indecent acts, but no serious physical violence. The prisoner was convicted of an aggravated assault, and was sentenced to three months' imprisonment with hard labour.

Upon motion for a prohibition, *held*, that there was evidence before the Justices upon which they were justified in finding that the assault was one of an "aggravated nature" within the Act 18 Vic., No. 9, s. 1.

MOTION for a rule *nisi* for a prohibition to restrain certain Justices at Bega in the matter of a conviction of one Jones for an aggravated assault on a female child. The prisoner was sentenced to three months' imprisonment with hard labour. The rule was asked for on several grounds—amongst others, on the ground that there was no evidence before the Justices to support a conviction for an aggravated assault, within the meaning of the Act 18 Vic., No. 9, s. 1. The evidence shewed indecent acts by the prisoner, but the prosecutrix admitted that she had not been injured or hurt in any way.

Knox moves for the rule. Indecent assaults are provided for by another statute, and are made subject to a heavier punishment. Here the evidence proved, if anything, an indecent assault. The statute 18 Vic., No. 9, s. 1, was intended, as the preamble shews, to apply only to "violent assaults" on women and children. It merely provides for assaults not sufficiently punished as common assaults under the 9 Geo. IV., c. 31. No one guilty of an indecent assault would have been charged under that statute. *Ex parte Little* (*b*) is in point. It is there held that an aggravated assault is one attended with considerable physical violence. *Reg.* v. *Sparrow* (*c*) treats "an assault occasioning actual bodily harm" and "an aggravated assault" as synonymous terms.

PER CURIAM (*d*). The Justices were fully justified in convicting of an aggravated assault on this evidence. *Ex parte Little* must be considered in connection with the particular facts of that case. It does not go the length of holding that there can be no aggravation but physical violence. It only decides that in that case the violence was not sufficient to constitute an aggravated assault. On other grounds the rule is granted.

Attorney for the prisoner—*Manby*.

(*a*) June 26. (*b*) 12 S. C. R. 323. (*c*) 30 L. J. M. C. 43. (*d*) Sir JAMES MARTIN, C.J., HARGRAVE & Sir W. MANNING, JJ.

LAING AND OTHERS *v.* BAIN AND OTHERS. (*a*)

Ejectment—Statute of Limitations—Evidence of possession.

Upon the trial of an action of ejectment, in which the defence was possession under the Statute of Limitations, Sir *James Martin*, C.J., directed the jury that the evidence of any acts of possession done subsequently to the commencement of the period of 20 years before action brought was immaterial; that for the purpose of shewing a possessory title the same particularity was required in defining the area and boundaries of the land as would be required in shewing a title under a deed of conveyance; that certain acts, such as putting up fences, &c., did not amount to possession unless done with the intention of excluding all comers from the land; and also that there was no evidence in support of parts of the defendants' case. A rule *nisi* for a new trial being moved for on the ground of misdirection, Sir JAMES MARTIN, C.J., and HARGRAVE, J. (FAUCETT, J., *dissentiente*), refused the rule.

Per Sir JAMES MARTIN, C.J., and HARGRAVE, J., the verdict was not against evidence.

Per FAUCETT, J.: The *Chief Justice* went too far in saying that there was no evidence upon some of the points, and ought not to have taken the case from the jury.

What is sufficient evidence of possession under the Statute of Limitations considered.

MOTION for a rule *nisi* for a new trial. The nature of the action is fully stated in *Laing and others* v. *Bain and others* (*b*). The third trial, granted by the Court last term, took place before Sir *James Martin*, C.J., and a jury on the 21st, 22nd, 23rd, and 25th of May. The jury found a verdict for the plaintiffs for all the land claimed, except a portion comprising a paddock, in which the house formerly belonging to Lieutenant Mitchell was built. At the trial some new evidence was given, which will be found noticed in the argument of counsel and the following summing-up of his Honor the *Chief Justice*.

Sir JAMES MARTIN, C.J. This action is brought by the plaintiffs to recover possession of 2560 acres of land on the River Hastings, in the district of Port Macquarie. The land claimed has a mile frontage to the river; the western boundary is a straight line going back 320 chains—that is, four miles from the river; the back line is one mile in length; and the eastern boundary is partly a creek, and partly a line, the two together being about four miles long. It appears that in 1829 a grant of this land was promised by Governor Darling to a Lieutenant Mitchell, who had been an officer in the navy for twenty years, in consideration of services rendered in that capacity. At that time it was thought desirable that persons of that class should be induced by such grants to settle upon the land. It appears also

(*a*) June 7. (*b*) *Ante*, p. 28.

that, before an actual grant was obtained, Lieutenant Mitchell went down to the place, built a cottage (it is called the mansion, but it was a weatherboard cottage), and lived there for some time. In 1833 he was killed by the falling of a tree. As he left no will, no disposition of this property took place, and it was vacant for some time; until, in 1840, two sisters and a nephew of Lieutenant Mitchell (the nephew being the plaintiff Laing, who is now stated to be in the asylum at Liverpool) got the grant made to them as Lieutenant Mitchell's representatives. It is not proved that these grantees or any of them ever had actual possession of this land. In the course of years the two sisters died, and their title has descended to others, so that the legal title is now vested in a number of persons. As you have heard, there have been already two trials of this action, and it is not now disputed (indeed, it is conceded by Mr. *Butler*) that these plaintiffs are the persons now entitled under that grant to the property; that, by the deeds, they have a good title. Unless, therefore, the Statute of Limitations puts them out of Court, they are clearly entitled to your verdict.

Now, although these plaintiffs never were in actual possession, they would be entitled to succeed in this action if no one else had gone into possession at a date twenty years before the 10th of February, 1874, when this action was commenced. If anybody else got into possession (and I will explain presently what "possession" means) twenty years before the 10th of February, 1874, that is, on or before the 10th of February, 1854, then, as to all that portion of the land of which that person got into possession, the plaintiffs could not recover. And the reason is that a statute has been passed, founded on common sense, which secures a man from looking all his life to the title to his land. His deeds may be burnt, his witnesses may be dispersed, and the law justly and reasonably says that after the lapse of a certain time (which, in the case of landed property, is fixed at twenty years) he shall not be required to produce either his deeds or his witnesses; but his title to the land he has been occupying as owner shall not be questioned. The Act was not passed with the object of allowing a person to squat down on the lands of anyone who was not occupying them and to acquire a title against the real owner. That may be, and is, the *effect* of the Act in certain cases, but the *object* with which it was passed was to avoid the inconvenience of owners of property having to keep evidence by them for so long. As an illustration of the working of the statute, suppose one of yourselves to be the owner of a piece of land under, it may be, a grant from the Crown. It is vacant land, and you leave it unoccupied and unimproved, and some one else goes in without any

claim, and squats there. As soon as he goes in your right to bring an action to oust him arises, and at any time short of twenty years you can bring that action; but if you let the occupation go on for twenty years it is then too late to interfere, and you are barred by the statute from bringing your action. But if, at any time within the twenty years, you should regain possession, there will be a new point of departure, and you cannot lose your title until another twenty years after that has elapsed. That question does not arise here, for, from first to last, neither the plaintiffs nor the persons under whom they claim appear to have gone into possession.

There are two things for you to consider. First, whether anyone was in possession of the whole or any part of this Redbank Estate before the 10th of February, 1854; and, secondly, if you come to the conclusion that some one was in possession of part of the property, then of what part? If any persons were before that date in possession of the whole, then there ought to be a general verdict for the defendants; if in possession of only a part, then the verdict should be for the defendants as to that part, inasmuch as the plaintiffs can only recover so much of this land as was not in the possession of some one else twenty years before the action was brought.

The twenty years' possession is sought to be made out by the defendants in three ways. First, they rely on the evidence of some land at a place called Worrell's Flat, near the back of this property, having been used as long ago as 1849. The defendants' case is that in 1849 an old man named Worrell had his wife and children there in a hut, occupied part of Redbank, and asserted a right to it; therefore, they say, if that possession would cover the whole of the grant, there is an end of the plaintiffs' case. Again they say that in 1851 Worrell went to live at what has been called by the witnesses the homestead—that is, near the original house built by Lieutenant Mitchell—that he put up a hut in a paddock there; that he cultivated in the paddock; and that he repaired with saplings an existing fence enclosing about eighty acres. So that, even if you are not satisfied of possession by Worrell at the Flat, here, according to the defendants, is clear evidence of possession by him at the homestead. Besides his occupation of the eighty acres, a part of their case is that he had cattle going all over the estate, and that his sons used to take them out to the back to graze. Further, they say that the owners of the adjoining land, one Pendrey and his partner, put up a fence right across Redbank; that they grazed over it and used it with stock, and that that was a possession, and a using of the land to the exclusion of the true owner; and that, in

some one or other of these ways, the whole of the grant passed out of the possession of Lieutenant Mitchell's representatives. And it is not necessary that the defendants should make out a chain of title connecting them with the persons who first went into possession. If *anybody*, whether connected with the defendants or not, got into possession of the whole, twenty years before this action was brought, then there ought to be a verdict for the defendants; if of part, then they are entitled to a verdict as to that part.

Now the question arises whether these acts amount to *possession*—to such possession as will exclude the real owner. Now possession must be with the intention of holding dominion over the land; it must not be going on the land for a picnic excursion or a shooting excursion. Or if a man goes upon a flat, and remains there, either for the purpose of shooting, or of enjoying the scenery, or for any other temporary purpose, that is not possession. If a man rides over a piece of land once, twice, or even every day, or lets his cattle graze over it, that by itself is not possession. If a man whose occupation is timber-cutting is passing down a river in his boat on the look-out for suitable timber, and goes ashore wherever he sees a tree that suits him and cuts it down, that is not possession. If he comes to a place where there is a number of suitable trees, and he stops there, and puts up a gunyah, and remains long enough to cut down all the trees, and goes away, that is not possession. Again, if a man makes a fence of whatever kind, whether a sapling fence or a three-rail fence, without any intention of exercising dominion over the land, that is not possession. All these are trespasses, for which the owner of the land may bring an action or not, as he likes, but they do not amount to possession. The person taking possession must manifest an intention to exercise dominion over the land, to remain there, to exclude every one else from the use of it. The intention with which he goes upon the land is the real question; and that intention can be ascertained only from what he says and what he does. His acts are of the greatest importance—they speak for themselves—but what he says may not truly represent his intention. Driving cattle across land is not possession; putting up fences for mustering cattle is not possession; building a gunyah for temporary purposes is not possession. It must be something manifesting an intention to occupy, and to occupy against all comers. If twenty persons had gone upon this land with their cows and had fed them all over it, no one of those persons would have been in possession, inasmuch as his occupation would not have been to the exclusion of the others.

Apply these principles to the case before you. First, as to the occupation of Worrell's Flat. Three witnesses speak of

having seen Worrell at the Flat and of his living there with his wife and children. On that point, I would invite your attention to the fact that Worrell was at that time lessee of five acres of land on the Rosewood Estate, which he had taken on a clearing lease, which he had occupied with his wife and family, and where one of his children was born. It is proved that he went there in 1847, and was found there still in 1854, when he was occupying another piece of land on the same property, the lease of which expired in 1855. You will probably have no doubt of these facts, as they are proved by a number of respectable and intelligent witnesses, on whose evidence you will probably rely. I may state that in this case a larger number of witnesses of respectability and intelligence have been examined on both sides than I ever remember to have seen called in any similar case. It speaks well for the district of Port Macquarie, a district generally looked upon as lying out of the world altogether, that so many persons of the character I have mentioned should have been brought from there to give evidence. Worrell's wife died at Rosewood, and his family (according to some of the witnesses) were there all through. They had crops on the land, which were put in and taken off every year. In 1855 he went away with all his belongings, having taken a crop off the land the last year he was there. His occupation was that of a shingle-splitter and stave-splitter; he had a boat in which he used to go up and down the river in search of timber, and he was often absent for some time from Rosewood. The defendants' case is that, contemporaneously with this state of things, Worrell had another place at Worrell's Flat, some miles away from Rosewood, and on the opposite side of the river. Now, first, are you satisfied that the witnesses are clear as to their dates, and that he was at Worrell's Flat at all at that time? secondly, if he was there, what was he doing there? You will consider his circumstances and his calling at the time, and you will say whether he was there with the intention only of getting timber, or with the intention of occupying these 2560 acres. If Worrell had a gunyah there merely for the purpose of cutting timber, while his home was at Rosewood, that would not be possession. And here I may make a general remark. Suppose the litigation were about a paddock, a comparatively small space cleared and fenced in; then if a man goes into one corner of it and lives there, he may be very reasonably said to be in possession of the whole of it. But when we are dealing with unenclosed bush-land, and land of a considerable area, it is not the law that a man can by taking possession of one corner claim to have possession of the whole. This Court has said that the law is not so absurd as that, and that, if a man

intends to take possession of the whole, he must do something to shew that intention, either by employing persons to ride along the boundaries, or by marking those boundaries, or in some other manner, so as to give notice to other people what he intends to occupy. And there is no evidence that the land claimed in this action was ever fenced all round; in fact there is evidence that it was never enclosed at all. You will, therefore, have to say, in the first place, is the date right? If you are satisfied on that point, you will next have to decide what he was doing there, bearing in mind what he was doing elsewhere. Was he there exercising dominion, either by excluding other persons, or in other ways? Then, suppose he was there at that time, and suppose he was exercising dominion over some part, how much was he occupying? There is no evidence to shew that he was occupying any part except the spot he was actually living upon, and that spot is not fixed for you. If a man claims land under a conveyance, the conveyance is of no use whatever to him unless the description shews clearly the boundaries of the land he claims. And this Court has lately held that if he claims by possession, he must make out the boundaries just as clearly. Here I cannot see any evidence of any possession at all that is tangible or definite. There are no lines fixed for you; even the position of the hut is not clearly defined. Unless the evidence of possession given defines the extent and position of the land occupied, it goes for nothing Of course if the occupation of Worrell's Flat was an occupation of the whole grant, that is clearly enough marked out, but I can see no evidence that it was. But for a warning which old Worrell is said to have given to one of the witnesses who was cutting timber near the flat, there is no evidence that he ever knew or said anything about boundaries from first to last. Of course, if that warning was not given before February, 1854, it is of no importance at all; and the witness will not swear that it was before that date, though he thinks it was earlier. The burden of proof in this matter is cast upon the defendants, and they must make out to your satisfaction—and not as a matter of doubt or conjecture — that there was a possession before February, 1854. But there was nothing in 1850, when old Worrell is said to have been living at Worrell's Flat, to shew how much he was then occupying. You are asked to say that, because he was there in 1850, with his wife and family and two cows, that he was in possession of 2560 acres of land. With nothing more than that, can you say that he was, especially when we know that he had a clearing lease on the other side of the river at the same time? I tell you that there is no evidence to justify you in finding that he was in possession of the whole grant at that

time. The same remark applies to the possession of any part by him. There is no evidence to enable you to draw lines to shew what part, or to fix any defined position.

Then it is said that the putting up of the fence by Pendrey and his partner, the owners of the adjoining property, Greenbourn, was an act of possession prior to 1854. But it appears that they put up the fence without any reference to boundaries. It extended from a creek on one side to a swamp on the other, and was intended for their convenience in mustering their cattle. The question for you is whether Pendrey and his partner, or Frazer, or any of them, were in possession (in the way I have mentioned) of any portion of the grant. If that fence was only put up there as a kind of wing to guide the stock to a stockyard, or for such a purpose as that of driving kangaroos into a yard to be killed, then there was not possession. The erection of the fence was a trespass, but not possession in the sense in which you are to consider it. Then there is evidence that the fence was used by other persons, and their stock depastured in the paddock enclosed by it. Unless one of these persons had his stock there for the purpose of exercising dominion, there was no possession. If I have a thousand acres near Sydney, and I choose to leave them vacant and unimproved, and all my neighbours run their stock over them indiscriminately, no one of them has possession, because no one of them occupies to the exclusion of the others. Nor would it be possession when Frazer went to live in the house, for he says he had no intention of exercising dominion. If you are not of opinion that the possession of the grant is made out by the alleged occupation of Worrell's Flat, you will have to say whether these acts of Pendrey and Frazer amounted to possession. And again the difficulty arises—how far do they extend? There is no evidence to guide you—it is all too vague—it would not be sufficient as a description in a conveyance, and it is not sufficient when it is a question of adverse occupation.

And now we come to the pith of the case, and the circumstances on which the defendants mainly rely to make out their case of possession. And the first question is—when did the occupation by Worrell of the homestead begin? There is the evidence of several witnesses that he was there before 1854. There is evidence that he was there cultivating, and that some stock of his were seen there before 1854, and a commission agent, who was called, bought corn from him before 1854. It is said that some of his witnesses were too young at that time to remember the date now with accuracy, but that remark will not apply to the commission agent, and you will probably consider his evidence satisfactory. If you are satisfied, then, that Worrell was there before 1854, in what

character was he there? If he was cultivating corn, that looks as if he were exercising dominion over the land by using the soil in such a way as must necessarily exclude all other persons. His wife was once seen in his hut there, but there is no evidence that that was before 1854. The plaintiffs' case is that this man, being a shingle-splitter and splitter of staves, went ashore there and built a small gunyah, so as to be near his work, and that he had his sons with him to render him some assistance. They admit that he was there bodily, but say that he was not in possession. The answer to this is that he had corn there; the quantity is not accurately stated, but it is certain that there was some. Where he was living there was a piece of ground fenced and enclosed, and there is evidence that he gave people permission to put cattle into the enclosure before 1854. Well, as to that enclosure, was he possessed of it, in the sense of exercising dominion, before 1854? If you find that he was, you should give a verdict for the defendants for that portion of the land It has not been clearly defined by metes and bounds in the evidence, but it is probably capable of being ascertained afterwards. But the defendants go farther, and say that Worrell was in possession of the whole grant. He allowed these cattle not only to feed in the enclosed paddock, but to graze over 600 or 700 acres, up to the fence which had been made for mustering, and the position of which is not fixed. I cannot see any evidence to shew that Worrell was possessed of the whole of the grant, of which the back boundary, it appears, had never been fenced, nor had Worrell ever been to that back boundary either with his cattle or by himself. Because the grant is marked out as 2560 acres, it does not follow that a man on the corner of it is in possession of the whole. The same rule would apply to 25,000 acres, and such a state of the law would be ridiculous. It is said that Worrell's cattle grazed right back to the limits of the grant, but you have to consider under what circumstances they did so. You have to determine whether he was occupying the grant with his cattle, with the intention of excluding all the world. The 80 acres (or whatever was the extent of the enclosed piece of land) stand on a different footing altogether, but, if there are no materials put before you from which you can fix the limit of the occupation outside of the enclosed portion, you cannot find for the defendants, for they must make out their case.

A good deal has been said about these defendants having been in possession for many years. It has been put to you by Mr. *Butler* that they have gone on the land, which was then waste, and have spent money on it, cultivated it, and improved it. The real owners never took any steps to occupy it, allowed

it to remain idle and unimproved, and they are therefore not now entitled to your consideration. Therefore (it is said) you ought to look favourably upon the defendants' case. You must do nothing of the kind—you must go by the law. It would be a dreadful state of things if juries were to be guided by considerations of this kind, which have nothing to do with the case, and allowed themselves to be swayed by the eloquence of counsel instead of deciding according to the evidence. There would then be no certainty, and everyone's rights would depend, not on the law, but on the appeals to the passions or sympathy of each particular jury. It is a matter of no moment in this case that these people have gone on the land and improved it; on the other hand, it may be pointed out that they never even asked for a conveyance, or took receipts for the purchase money that they paid. That shews that they knew that Worrell and his sons had no title to the land, and that their only chance was in these plaintiffs lying by and not taking steps to eject them.

I will now read to you McCarthy's evidence, which I have not yet noticed. He says he knew Worrell to be living at Redbank from 1851 till his death. This cannot be true if it is meant that he was living there continuously, as we have evidence that he was part of the time at Rosewood. "I never knew him to be living anywhere else." That shews that the witness could not have had his eyes upon him very closely. "As far as I could see, he had 30 or 40 acres in cultivation." That is a much larger quantity than any other witness speaks of. "Thirty or forty head of cattle running over the whole." Taking that evidence by itself, it is of little value. He does not define what he means by "the whole." No jury would be justified in finding upon that piece of evidence that Worrell was possessed of the whole grant. "I know that the property belonged to Major Mitchell. I understood so from Worrell. He said he occupied and meant to." This evidence is much too vague to be of any use. No time is fixed when this statement by Worrell of his intention was made. "All the neighbours' cattle used to run over the land." Does not that negative an exclusive possession by Worrell? I do not see anything in that evidence to warrant you in finding that before February, 1854, Worrell occupied the whole or any defined portion of the grant. I will now leave the case in your hands. I intended to read the principal portions of the evidence to you, but after noticing them as fully as I have done I do not think it is necessary. If you are to find for the defendants as to any portion of the land claimed in this action, they must give you materials to fix the boundary lines of that portion. You may be satisfied that Worrell was in possession of the paddock, and if you think so you may indicate it and find that he was in possession of

that portion, leaving the boundaries of it to be settled afterwards. But the burden of proof is on the defendants; and if they have not supplied you with the necessary materials you cannot find a verdict for them.

The following grounds were taken in the memorandum filed :— 1. That the verdict was against evidence. 2. That his Honor told the jury that anything done by James Worrell (deceased) after February, 1854, either in warning persons from coming on to the Redbank Estate, or otherwise in assertion of dominion over the estate, would be of no use at all to the defendants, and was of no consequence whatever; and that the defendants must make out to the satisfaction of the jury that Worrell was asserting dominion before February, 1854, and that that must not be left to doubt or conjecture. 3. That his Honor told the jury that, for the purpose of shewing possession of land, the same particularity was required in defining the area and boundaries of the land as would be required in shewing a title to the land by a deed of conveyance. 4. That his Honor told the jury that there was no evidence that Worrell at any time knew the boundaries of the Redbank Estate, and that there was no evidence to justify the jury in parcelling out to Worrell the N., S., E., or W. boundaries of what he occupied. 5. That his Honor told the jury that the evidence of the putting up of a fence across the Redbank Estate by Pendrey and others, and of the user by them and their successors of the portion of Redbank included within that fence, was no evidence of possession by them of that portion, unless they intended to take possession of it as their own to the exclusion of all comers. 6. That his Honor told the jury that there was no evidence whatever to shew that Worrell was ever in possession of the whole of the 2560 acres. 7. That his Honor told the jury that the evidence of the witness McCarthy—that Worrell's cattle were running over the whole—was no evidence upon which the jury could find that Worrell was possessed of the whole, because McCarthy did not say what the whole meant, the witness having subsequently stated that the whole estate comprised four sections, containing 2560 acres. 8. That his Honor told the jury that the statement of Worrell to McCarthy—that he knew the property belonged to Major Mitchell, and that he occupied it and meant to, whatever may have been the date of that statement—was of no consequence. 9. That his Honor told the jury, in reference to McCarthy's evidence generally, that it did not warrant the jury in finding that Worrell was in occupation of the whole or any part of the 2560 acres prior to 1854. 10. That his Honor told the jury that there was no evidence of possession of any part of the land claimed except the enclosed paddock in which Lieutenant Mitchell's house had been built.

Butler, Q.C. (*Donovan* with him), moves, on behalf of the defendants, for a rule. We complain of his Honor's direction that the conduct and declaration of Worrell after 1854 were of no consequence. By itself, an act of dominion after 1854 would be of little moment; but, coupled with the actings before 1854, it shews an intention, a continuous intention, to occupy and assert dominion. We find Worrell in 1853 claiming possession near one boundary of the land; is it of no consequence to shew what he continues to do afterwards? Bourne's evidence was most important. It was for the jury to judge from what Worrell did afterwards what his intention was before. The jury were also told that the defendants must make out that Worrell was there before 1854, and that nothing must be left to doubt or conjecture. We object to that ruling. The general rule in all cases applies here—that the jury must be satisfied by the preponderance of evidence. The next thing we complain of is the direction that the same preciseness is required in proving a possessory title as in proving a title under a conveyance. It has been held that it is sufficient to prove such possession as will maintain trespass. [Sir JAMES MARTIN, C.J.: That point is not open to you; it was decided by this Court on the last argument.] As to our 4th ground we know what the N. boundary of the land was. [Sir JAMES MARTIN, C.J.: But is there any evidence that Worrell knew?] But we know, and there is evidence that he warned McDonough off near where the N. boundary is, and spoke of his boundary. Then there is evidence that in 1857 he knew the E. boundary. Then McCarthy's evidence goes to shew that he knew the boundaries. There was certainly evidence from which the jury might imply that he knew the boundaries of the estate, and a jury ought to be allowed to exercise their reasoning faculties on the evidence. Then, as to Pendrey's fence—why must there be an intention to exclude all comers? That is going back to the doctrine of adverse possession abolished by the Statute of Limitations. [FAUCETT, J.: The old doctrine of adverse possession was a very different thing.] At any rate, if there ever was a manifestation of an intention to exclude, this three-rail fence was. The only question is—had Pendrey such possession of the part enclosed by that fence as would enable him to maintain trespass. He clearly had, and the verdict was against evidence on this point. With reference to the 6th ground, Partridge gave evidence that Worrell had possession of the whole of the 2560 acres; he fed cattle by Worrell's permission all over the property. Then as to McCarthy's evidence, that ought to have been left to the jury for them to judge of its effect. It was entirely taken away from them by his Honor's direction. They were told to

disregard it altogether. We also say that the verdict of the jury was clearly against evidence. Pendrey's possession more than 20 years before the commencement of the action was made out beyond any question. I may remind the Court that the verdict was not unanimous. [Sir JAMES MARTIN, C.J.: I do not see how we can take that into consideration.]

Sir JAMES MARTIN, C.J. The property in question in this case consists of 2560 acres. We are not told what its value is, but there have been three trials of the action, and the present application is for a rule *nisi* for a fourth trial. It is extremely probable that, if a new trial is granted, the costs of the proceedings will exceed the whole value of the estate, if they have not already done so. I mention that circumstance to shew that in a case like this the Court should not go out of its way to discover points of nicety upon which it might grant a new trial, and further extend this already protracted litigation; on the contrary, we should rather expect the party who comes with this application to make out a very clear case indeed for the interference by this Court with the verdict. Of course, where the points are clear, the defeated party has a right to ask for a new trial, however many trials may have taken place. That is his undoubted right. But, in a case like the present, if the litigant does not clearly make out his right, the Court ought not to strain any points in his favour.

As might have been expected, the evidence on this last trial was very much more extensive than on the preceding trials on all the points which touch the merits of the case. There was a larger body of evidence. The evidence of the former witnesses was supplemented by fresh evidence from them, and new witnesses were called; and the defendants have made out a stronger case than before. Their defence rests altogether on the Statute of Limitations. Confessedly, they have no legal title; and, confessedly, the plaintiffs have a good legal title traced up to the original grant from the Crown. The plaintiffs are unquestionably entitled to the land if the Statute of Limitations has not stepped in and barred their title. Still, however much the merits of the case may be against the defendants, if the points of law arising at the trial were in their favour, and were wrongly decided by the Judge against them, they are entitled to the rule they ask for.

The rule is moved for on ten grounds. I will pass over the first (that the verdict is against evidence) for the present. The second ground is, that I wrongly told the jury that anything done by Worrell after February, 1854, either in warning other persons off the ground, or otherwise asserting dominion, was of no

consequence. There were two witnesses who spoke of acts done by Worrell (on whose possession the defendants relied), one of the acts possibly after February, 1854, the other certainly after that date. In the second case the witness mentioned Worrell having spoken to him about some timber having been cut, and an arrangement was effected between them. The other witness was warned off a portion of land near the back boundary. Nothing turns now upon the question, which was left in doubt, whether this warning was given before or after 1854; that question was left to the jury. But the jury were told by me that, as to anything done by Worrell in the way of warning or assertion of right after 1854, they ought to pay no attention to it. I think that that was not a misdirection, but that I was perfectly right. I cannot understand how, the question being whether Worrell was in possession at some specified time, the fact of his possession at a subsequent date can be any evidence on that point. A man might have gone on the land only the day previously. I do not think that the place where a person was at a prior date, or the mode in which he was there, or what he was doing there, can be proved by such evidence; and it would be going altogether too far to hold that a man's acts in 1857 were evidence of his intentions in 1854. Then, it is said, I ought not to have told the jury that nothing was to be left to doubt or conjecture. But this is not a case in which we are to go out of our way to surmise anything in favour of a defence of this kind. It is no hardship to call upon a man who has gone upon land and occupied it without any title to make out a clear case under the statute. It is the least thing to be expected from him. He must shew how he was there, and what he was doing there (not merely that he was shooting, or cutting timber, or anything vague of that kind). And this Court has so held. I am about to cite from two of the judgments delivered in this very case last term, and published in the current number of Mr. Knox's Reports. I then said (*c*): "I go the whole length of Mr. *Stephen's* argument, that defendants, when they rely upon the Statute of Limitations, must thoroughly make out their case. It is not to be left to doubt or surmise where Worrell went, when he went, and what were the boundaries of his occupation. All these matters must be *proved*. If the defendants relied on a conveyance, they would be bound to shew the identity of the boundaries of the land claimed with the boundaries described in the deed; and with equal reason they are bound to shew with the same precision, when claiming by occupation, how far that occupation extended." I then expressed an opinion dead against the present contention, and I hold the

(*c*) *Ante*, p. 31.

same opinion still. And Mr. Justice *Hargrave* took the same view. He says :—"I agree that a title under the statute is to be governed by the same principles as apply to conveyances, as to the certainty of the boundaries of the land occupied. And a defendant is bound to put before the jury circumstances of occupation clearly applicable to the extent said to be occupied." And again :—"I think titles under the Statute of Limitations are not to be supported by the verdict of a jury unless the evidence is just as precise in every way as it is required to be in the case of documentary titles." That is now the law of this Court. In effect, this Court held that there must be no vague talk about a person grazing his cattle indefinitely over any extent of country; no surmise that the boundaries of his occupation coincide with lines, existing only on paper, not fenced, not even marked, where it is not shewn that anyone went; no inference that, because cattle graze somewhere within a grant, their owner has possession of the whole grant. But it is contended that, simply because cattle are on land which forms part of a grant, there being no evidence that they are there with reference to certain limits, there is a logical inference that they are running over the whole grant. It would be absurd to hold that, because cattle were seen on portions of the area, it followed that they were everywhere on that area; and the logic that would lead to such a conclusion seems to me pre-eminently ridiculous. And this Court has held that such is not the law—most righteously, as it appears to me. The defence of the Statute of Limitations must be respected, but it does not come forward in any way entitled to special favour. I think I was right in holding that any act done by Worrell after the 10th of February, 1854, even if it was done on the 11th, was of no consequence. The question of possession depends upon what is done at the time, not on what is done afterwards. An inference might be drawn from the subsequent acts, but this Court has said that nothing is to be inferred in favour of such a defence.

The third point has been given up in the course of the argument, as Mr. *Butler* had to admit that it was settled by our former decision.

With reference to the fourth ground, I will state shortly what took place at the trial. In my summing up I divided the defendants' case into parts, and I told the jury that they would have first to consider whether Worrell or somebody else was in possession before 1854, and that it was of no consequence whether the defendants claimed under the persons who may have been there before 1854. I told the jury to consider the question first with reference to the whole of the land claimed. Was anyone

at that time in possession of the whole? I told the jury several times that there was no evidence to warrant them in finding a verdict for the defendants as to the whole, and that there was no evidence that Worrell knew what the boundaries of the grant were. I say so still. This action was brought to recover a specific piece of land; it can only be defined by boundaries; and it must be defined by the verdict of the jury. There is no evidence from first to last that Worrell knew these boundaries, either in length or direction. The evidence of McCarthy is in the highest degree vague from beginning to end. Even if Worrell did tell him the extent, when did he do so? How utterly vague and worthless such evidence is! The statement by Worrell is not shewn to have been made, or his knowledge to have existed before 1854. I am therefore of opinion that this ground is untenable. There was no evidence to justify the jury in parcelling out to Worrell the N., E., S., and W. boundaries. What is there to shew that he exercised any rights over all the land within the lines described in the grant? There is not a tittle of evidence, unless we are to go to the extent that this Court has said we shall not go, and surmise something, or *imagine* that these cattle would feed up to the boundaries when left to themselves.

The fifth ground is that I wrongly directed the jury in telling them that the erection of a fence by Pendrey and the use by him of the land would not be acts of possession unless his intention was to exclude all comers. Substantially I think so still. My own words were:—"Then it is said that the putting up of this fence by Pendrey and his partner, the owners of the adjoining property, Greenbourn, was an act of possession prior to 1854. It appears that they put up the fence without any reference to boundaries. It extended from a creek on one side to a swamp on the other, and was intended for their convenience in mustering their cattle. The question for you is whether Pendrey and his partner and Frazer, or any of them, were in possession (in the way I have mentioned) of any portion of the grant. If that fence were only put up there as a kind of wing to guide their stock into a stockyard, or for such a purpose as that of driving kangaroos into a yard to be killed, then there was not possession. The erection of the fence was a trespass, but was not possession in the sense in which you are to consider it. There is evidence that that fence was used by other persons, and their stock depastured in the paddock enclosed by it. Unless one of those persons had his stock there for the purpose of exercising dominion, there was no possession. If I have 1000 acres near Sydney, and I choose to leave them vacant and unimproved and all my neighbours run their cattle over them indiscriminately, no one of them has possession,

because no one of them occupies to the exclusion of the others." What I told the jury, in substance, was that the mere fact of putting up the fence was not possession, unless done with the intention of taking possession. Even then there would only be possession of the part actually used; the erection of a fence would not give possession of all the land between that fence and the river. And if there was occupation, it must have been with the intention of excluding all others to amount to possession. It is said that this is going back to the old doctrine of adverse possession. But, in a certain sense, there is adverse possession even since the Statute of Limitations. It is not every kind of possession that will bar the right of the real owner. A tenant who occupies under a lease, though he has possession, has not such a possession as will oust his landlord, because it is not adverse to the landlord. But if a person goes upon land with the intention of excluding the owner, I know of no better way of speaking of his possession than by saying that it is adverse. I told the jury that there must be exclusive possession, and I think I was right. It is now said that the verdict was against evidence on that part of the case; I think there was no evidence at all to support the defendant's contention, but, at the same time, I left it to the jury to say whether the acts of Pendrey, with reference to the fence and the use of the paddock, were done with the object of excluding anyone.

The sixth ground has already been dealt with in considering the fourth.

The point raised in the seventh ground has really been decided already by this Court. This very evidence of McCarthy was before the Court when two Judges held that the former verdict had no evidence to support it. Quite irrespectively of that, I think now that it was of no use in support of the defendants' case. How can any man of common sense say that such evidence would justify any jury in finding that Worrell had possession of the whole of Mitchell's grant exactly as described by metes and bounds? Would it justify a jury in marking out a piece of land exactly four square miles in extent, and saying that that was occupied by Worrell?

As to the eighth ground, I still think that Worrell's statement to McCarthy, that he knew the property belonged to Major Mitchell, and that he occupied it and meant to, was of no moment at all, unless coupled with evidence that Worrell knew the boundaries of the grant. I also think that McCarthy's evidence generally was too vague to warrant the jury in finding a verdict for the defendants as to the whole grant.

The tenth ground is merely a repetition of some of the previous grounds. It is said that there was clear evidence that Worrell

occupied more than the homestead paddock, and the permission given to Partridge to turn out 600 or 700 head of cattle is relied upon. But there is no clear evidence where those cattle went. They were tailed in a larger outer paddock of about 600 or 700 acres. But the line of the fence was not clearly fixed. One witness drew a line which is contrary to what another swore was the line. The necessary precision is not complied with by such evidence. The boundaries are left in that degree of vagueness and uncertainty which the law will not allow. Under all the circumstances of this case, it appears to me that it would be idle to send this case down to another jury. It is quite impossible for these defendants to make out their right to any fixed definite area of land beyond the homestead paddock, unless they have recourse to those inferences and conjectures of which this Court has said they cannot be permitted to take advantage in establishing a defence under the statute. I think, therefore, that this rule ought to be refused.

HARGRAVE, J. I concur with his Honor in maintaining his decision on every one of these points in every respect. I think we are bound to maintain the principle of precision in all these defences, and that when persons are trying by force of the law to push out those who have acquired the land in a legitimate way, they must be made to strictly prove their case. It is quite impossible for owners of land in this colony to occupy all their property; much of the land cannot be profitably occupied or worked while the resources of the colony are still undeveloped; and this Court must never encourage these intruders—persons who live by going on land which they have never paid a shilling for; in fact, mere robbers of land. A title gained by means of the Statute of Limitations, without any pretence of any other right, must always strike an honest man as a rogue's title, and every one must feel disgust at seeing an attempt to maintain it.

Besides, most of the rulings of his Honor that are complained of are not what I understand by misdirections at all. They are mere statements of opinion on the evidence by the Judge who tries the case. In going through long and complicated evidence to the jury, a Judge has a right to assist the jury by his comments on the passages of importance; and this Court cannot control such comments so long as they do not amount to express directions on matters of law, but are mere remarks on the value of certain evidence. The true principle is laid down in *Black* v. *Jones* (*d*) by Chief Baron *Pollock*. He there says that it is the duty of the Court to see whether in the particular case the supposed misdirection really has produced any miscarriage. Here, so far from there having been a miscarriage of justice, I think the

(*d*) 20 L.J. Ex. 152.

evidence was very strongly against the defendants, and that the jury found a very proper verdict.

But when we look at these supposed misdirections, what do they amount to? It is not as if any evidence was excluded. All this evidence was admitted, and his Honor was perfectly entitled to comment on it as he did. Take the last objection, for instance. What lawyer can say that what one man says to another about his occupation is worth anything at all as evidence. His Honor was perfectly right in commenting upon that as he did. On all these points where his Honor said there was no evidence, there was no such evidence as ought to go before a jury.

I agree that when persons are coming upon land with the intention of ousting the rightful owner, their acts must be unambiguous, and if they are capable of two constructions, they must be construed most strongly against the intruders. Acts of possession must be such that, if the owner came to his land and saw them going on, he would be aware that someone was claiming to exercise dominion there. I also concur with his Honor in thinking that the question of the particularity and preciseness of description necessary is not open to controversy in the face of our late decision in this very case.

FAUCETT, J. I am sorry I cannot altogether agree with their Honors. His Honor the *Chief Justice* has alluded to the probability of the value of this property being swallowed up by the costs, and on that ground I am sorry that I cannot concur in the view they have taken. Upon the great majority of the points raised I do concur, as I think they are of very little importance with reference to the question we have to consider. About the alleged acts of ownership by Pendrey I do not differ from the *Chief Justice*. My chief difference is as to the effect of McCarthy's evidence.

I concur in the general statement of the law that, in order to get rid of a documentary title, the evidence as to the boundaries of the occupation must be clear and precise. I quite agree with the principle so laid down, but even if I did not, it would not be open to me to disagree, after the decision of this Court. But I think that his Honor, in directing the jury, carried that statement of the law too far. It appears to me that there was evidence that Worrell knew the boundaries of this land. Very probably he did not know that one line was exactly eighty chains, but he substantially knew where the boundaries were. He knew that Redbank had been granted to Mitchell, and that Mitchell had lived there. The grant was surrounded by other estates which were occupied by other persons. Surely the fact that he knew that the land was owned by Mitchell, that it was

well known in the neighbourhood as Mitchell's grant, and that there were adjoining properties used and occupied, was some evidence to go to the jury that Worrell knew the boundaries of the grant. I cannot agree with the construction put upon McCarthy's evidence. It is said that it is irrelevant and immaterial. Still, no objection was raised to its admissibility, and, having been admitted, it ought to have gone to the jury. How can it be said that though admissible as evidence, it must be disregarded? Taking that evidence without any surmise or argument, can we doubt that the period of which McCarthy speaks is between 1851 and 1854? No question was raised at the former trial, upon the same evidence, as to the date of which McCarthy speaks. To say that the witness does not mention the time at which Worrell made the statement, is to wrest the evidence from its natural meaning.

I cannot agree with their Honors that if the statement mentioned had been uttered a short time after February, 1854, it would have been of no consequence. I think it would be most material, and would have thrown light (it having been proved that Worrell had been in possession) on the nature of that possession. Of course it ought to have been made within a reasonable time afterwards. Nothing is more common than to give evidence of that kind to explain by what was said what had been done before. But I think, upon the fair construction of McCarthy's evidence, that he speaks of a date anterior to February, 1854, and I find that his evidence as to dates is confirmed by some of the witnesses who have been called for the first time on this trial.

I entirely agree as to the meaning of the term "occupation." The technical term, "adverse possession," has been got rid of by legislation. It was to get rid of that doctrine, amongst other difficulties, that the Statute of Limitation now in force was passed. But, in the popular sense of the term, there must still be adverse possession; there must be a possession adverse to the real owner; and it must be an exclusive possession, such as would entitle the person in occupation to maintain an action of trespass.

On the question of possession a good deal has been said, both in argument and in the judgments of their Honors, in favour of persons who have a documentary title. I confess I have no sympathy with these plaintiffs, and the law has as little sympathy as I have. From 1836 to 1854, before anyone took possession at all, there was no interference by them, and their conduct practically amounted to an abandonment of their claim. For upwards of twenty years after their titles accrued they have taken no step to enforce their rights. The law pays very little regard to persons

who sleep upon their rights for such a length of time. I am not prepared to strain the law either in their favour or against them. It is clear that for nearly forty years no person claiming under Lieutenant Mitchell was in possession. It has been proved that Worrell went on the land, cultivated it, knowing all the time that it was Mitchell's grant, and, as to portion of the land, was there before 1854. Then upon the late trial there was additional evidence to the effect that he was in possession of land at the head of Stony Creek, near the back boundary of this grant. At the former trial it was proved that Worrell's cattle ran nearly up to that boundary. Then there is the evidence of Partridge. In 1851 he went there, found a fence and gates, stopped his cattle, and went to Worrell to ask permission to put his cattle into the paddock. They remained there that night, and the next day the cattle were "tailed" over about 600 acres beyond the homestead paddock. Coupling that evidence with the fact of Worrell's occupation of the flat at the head of Stony Creek, and taking all the circumstances together, I think there really was evidence to go to the jury of Worrell's possession of the whole of the grant. McCarthy's evidence (though, taken by itself, I am bound to admit it would have had little weight) is of very great importance in connection with all the facts sworn to by the other witnesses. In a case of this kind, though each particular piece of evidence, taken separately, is entitled to almost no consideration, the general body of the evidence, taken all together, has very great weight.

I think the case ought not to have been taken from the jury. I quite agree with the observation of Mr. Justice *Hargrave*, that the comments which a Judge makes in merely advising the jury are not misdirections, and I admit that the real question is, not whether certain isolated passages of his Honor's charge went too far, but whether, taking the whole summing up together, his Honor was right substantially and on the whole. Did his Honor merely advise the jury as to the value of particular portions of the evidence? It appears to me that he took the case entirely out of the hands of the jury. I think that his Honor went too far in his directions, and that there ought to be a new trial.

Rule refused.

Attorney for the defendants—*R. B. Smith.*

LAING AND OTHERS *v.* BAIN AND OTHERS. (*a*)

Privy Council Appeal—Ejectment—Stay of Proceedings.

The Court refused to stay proceedings upon a judgment for the plaintiffs in ejectment pending an appeal by the defendants to the Privy Council, but suspended the issue of the *habere* for 6 months.

Butler, Q.C. (*Donovan* with him), moved for leave to appeal to Her Majesty in Council from the rule refusing a rule *nisi* for a new trial, and asked that all proceedings might he stayed pending the appeal. The defendants were small farmers; there was no other available land in the district, and if they were turned out of their holdings they would be ruined.

M. H. Stephen (Sir *G. Innes* with him), for the plaintiffs, objected.

PER CURIAM (*b*). There is no reason for departing from the usual practice of this Court. The plaintiff is entitled to the fruits of his judgment. But, in order to give the defendants time to remove from their properties, the issuing of the writ of *habere* will be suspended till the 1st of January next.

EX PARTE MARTIN GUEST. (*a*)

Friendly Societies Act of 1873*—Jurisdiction of District Court—Costs.*

G. sued the trustees of a friendly society in the Metropolitan District Court for arrears of sick-pay. The District Court Judge gave a verdict for the defendants with costs against the plaintiff. G. applied to *Faucett*, J., for a writ of prohibition to restrain proceedings to enforce the costs on the ground that the District Court Judge had no jurisdiction to decide questions under the Friendly Societies' Act, and had therefore no power to award costs. *Faucett*, J., refused the application.

On appeal, *held*, that the District Court Judge had jurisdiction to award costs against the plaintiff in that Court, whether he had jurisdiction in the subject matter of the complaint or not.

The applicant in person moved upon notice to set aside an order of *Faucett*, J., in Chambers, refusing a prohibition directed to the Judge of the Metropolitan and District Court and the respondents, to restrain all proceedings against the applicant to enforce payment of the costs of an action brought by him in the District Court against the trustees of a friendly society for arrears of sick-pay. The Act 37 Vic., No. 4, provides for applications to the District Court by members of friendly societies, but gives

(*a*) June 12. (*b*) Sir JAMES MARTIN, C.J., HARGRAVE & FAUCETT, JJ.

(*a*) June 12.

no power to award costs; and by s. 16 it is provided "that the Primary Judge may make such order for regulating the proceedings by and before the Judges of District Courts under this Act as he may think fit, and such Judges may regulate the proceedings before them respectively so as to render them as inexpensive and summary as conveniently may be." The Judge had no power to award costs; first, because the Act giving him the jurisdiction gives him no such power; secondly, because he has no jurisdiction at all till rules are made as required by the Act.

Foster, for the respondent, was not called upon.

PER CURIAM (*b*). There is clearly no ground for this application. The applicant went as plaintiff into the District Court and sued the officers of the society there. The case was heard, and the Judge dismissed the plaint and ordered the applicant to pay costs. That order was made, not under the Friendly Societies Act, but under his general powers as a Judge, and was one he had a perfect right to make.

Appeal dismissed without costs.

Attorneys for the respondents—*Pigott & Trickett.*

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN THE THIRD TERM, 1877.

NERNEY *v.* THE QUEEN. (*a*)

Petition of Right—Demurrer—Parties to Suit—Amendment.

An Act of Parliament (37 Vic., No. 2) provided that grants of certain portions of reclaimed land should be issued to certain persons named in the schedule to the Act, "upon the establishment by such persons of their respective titles to the portions of land" deprived of their water-frontage by the reclamations. N. filed a petition under the Act 24 Vic., No. 27, as transferee of some of the persons named in the schedule to the Act, against the Crown for delay in issuing a grant. The petition contained no allegation that N. had established her title, though it was stated that an abstract of the title had been forwarded to the Crown Solicitor. Upon demurrer,

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*), that the petition did not sufficiently allege that the suppliant had established her title.

Held, also (*per* HARGRAVE and Sir W. MANNING, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that, although the suppliant was not named in the schedule to the Act of Parliament, she had a right to compensation against the Government, and that the petition might be amended by adding an allegation that the suppliant had established her title.

PETITION OF RIGHT on the part of Catherine Agnes Nerney, widow, stated:—

1. That your suppliant on the 16th day of October, 1873, purchased from the trustees of one Joseph Brady, deceased, their right, title, and interest in certain reclaimed land in Woolloomooloo Bay.

2. [Set out the enacting part of the Act 37 Vic., No. 2.] That the name, "the trustees of the late Joseph Brady," was inserted in the second column of the schedule to the said Act as being entitled to a grant of three parcels of land therein described.

3. That on or about the day of 1874, your suppliant received a notification from the Colonial Secretary's office, requesting her

(*a*) August 30.

to submit the abstract of her title to the Crown Solicitor, in order that the title of the said land might be established.

4. That on the 11th day of February, 1875, the abstract of title was forwarded to the Crown Solicitor.

5. That, notwithstanding repeated applications made by your suppliant, she was unable to obtain the report of the Crown Solicitor until the 1st day of June, 1876, and that the Crown grants for the said land have not yet been issued.

6. That, owing to the said delay in obtaining the said reports and grants, your suppliant has been unable to deal with the said land, and has sustained damages to the amount of £10,000.

The petition was presented to the Governor, who indorsed his *fiat* upon it.

The Attorney-General demurred to the petition, upon the following grounds:—1. That the petition discloses no contract between the Crown and any one in reference to the said grant. 2. That, assuming that a contract is shewn, no breach of it is set forth. 3. That no breach of any duty by the Crown in relation to the said grant is disclosed by the petition. 4. That if the petition sets forth any contract or duty, it is with or towards, respectively, the trustees of Brady deceased, and not with or towards the suppliant. 5. That it does not appear by the petition that the title to the said land, in respect of which compensation was granted, has ever been established by any one, or, if so, that the Crown has refused to issue a grant, or that an unreasonable time for the issue has passed, or that any obligation of the Crown in respect thereto has been disregarded.

The Act 37 Vic., No. 2, is in the following terms:—Whereas, in pursuance of the provisions contained in the "Woolloomooloo Bay Land Reclamation Act of 1862," the land described in the schedule to the said Act has been reclaimed from the waters of Port Jackson; and whereas, in consequence of such reclamation, certain owners of land severed from immediate contact with the said waters became entitled to compensation, as provided by the said Act; and whereas some of such owners as aforesaid, or persons claiming through or in trust for such owners, have severally agreed to accept, subject to the approval of Parliament, certain portions of land in the said Bay, formerly lying below high-water mark, and alleged to have been severally reclaimed from such waters by such owners as aforesaid, as and in full satisfaction for and extinction of all claims whatsoever of them the said owners or such persons as aforesaid; and whereas it is necessary that the said several agreements should be ratified by Parliament: be it therefore enacted, &c., as follows:—It shall be lawful for the Governor, with the advice of the Executive Council, to grant to the

several persons mentioned in the second column of the schedule to this Act, upon the establishment by such persons of their respective titles to the land in respect of which the portions of land hereinafter mentioned are authorised to be granted, by way of compensation for losses of water-frontage, the portion or portions of land set against their respective names in the said schedule according to the respective areas and descriptions as set forth in the third and fourth columns thereof. And each such grant of any of the said portions of land to any such persons or corporation shall be in full satisfaction and compensation for any losses whatsoever sustained by such persons, whether in their own right or derivatively, by reason of the reclamation of the land or any portion thereof described in the schedule to the "Woolloomooloo Bay Land Reclamation Act of 1862," and shall operate as an extinguishment of any right, title, claim, easement, or interest of or belonging to the owners, and of any persons claiming through or in trust for them or any of them, of any land so severed from contact with the waters of Port Jackson as aforesaid, and as compensation for which severances the aforesaid portions of land are hereby authorised to be granted respectively.

M. H. Stephen for the Crown in support of the demurrer; Mrs. Nerney, in person, in support of the petition.

Sir JAMES MARTIN, C.J. This proceeding is brought against the Queen under rights alleged by the suppliant to have been conferred upon her by the Act 37 Vic., No. 2. [His Honor read the Act.] The plaintiff here is not one of the persons whose names appear in the schedule. The trustees of Joseph Brady are named, and it is stated in the petition that she purchased from those trustees their right to the pieces of land mentioned in the schedule. She also states that she sent in her abstract of title two years ago, and that she has not yet obtained a grant from the Crown; and this action is now brought against the Crown for delay in issuing the grant. The Crown has demurred on two grounds, viz., that it is not alleged that her title was established, and that whatever remedy Brady's trustees may have, she has no right of action. Other grounds are taken, but on those two grounds I think that our decision must be against her. I think that the Act does establish a contract to this land, not between the Crown and Mrs. Nerney, but a contract between the Crown and the trustees and the other persons named in the schedule to the Act. The ground of demurrer that no contract with any one is disclosed is therefore not a valid one. It may well be that the trustees have a right of action, but I think that any right which they may have has not passed to the plaintiff. I draw a distinction between an action brought by a vendee for damages for non-completion of

a contract for sale, and a suit brought by a vendee to compel specific performance of the contract. In the latter case a purchaser from the vendee of his equitable interest has in equity exactly the same rights as the person who transferred to him. But the right to bring an action for damages for breach of a contract is altogether different. The contract here is made with Brady's trustees. Mrs. Nerney is not now asking for specific performance—that might be a different matter—but for damages for the breach of a contract which was not made with her.

But, suppose there should be any doubt upon that point, the other objection is clearly fatal. Under the Act it is essential, before having any right at all against the Crown, that the owner must establish his title. It may seem curious that the Legislature, after clearly recognising these persons as owners, should yet require them to make out their right to the land; but the words of the statute are express. And here the petition does not allege that Mrs. Nerney established her title. Sending in an abstract is not establishing a title; not even sending in an abstract shewing a perfectly good title on the face of it. Even assuming the abstract shews a good title, it requires proof. And here it is not even alleged that the abstract shewed a good title, or that Mrs. Nerney had in fact a good title. It is quite clear that, upon the facts alleged in the petition, the Act 37 Vic., No. 2, gives no remedy at all. Even if Mrs. Nerney were a person named in the schedule to the Act, she could not recover against the Crown without first establishing her title.

I think for these two reasons that the demurrer ought to be sustained. That being my opinion, it is not necessary for me to say anything about the other points raised, but I consider that if it had been alleged that Mrs. Nerney had established her title, there would be sufficient allegation of unreasonable delay in the petition.

HARGRAVE, J. This demurrer ought to be altogether overruled upon the plainest possible principles. The first section of the Petitions of Right Act (24 Vic., No. 27) requires that the petition "shall set forth with convenient certainty the facts entitling the suppliant to relief." All that we have to see as Judges is whether such facts are set forth as sufficiently indicate what the claim of the suppliant is. It is said that the petition does not allege that her title has been established; but the law is perfectly clear that, even in a bill for specific performance, it is not necessary for a plaintiff to state that he has a good title. It is only necessary to allege that there has been a contract of sale, and that it has been broken; and it is quite sufficient if the plaintiff makes out a good title when he goes into the Master's office. As to the contract with the

suppliant, that is clearly made out. The third paragraph of the petition states that the suppliant received a notification from the Colonial Secretary's Office requesting her to submit her abstract of title. That was a clear recognition by the Government that there was a contract with Mrs. Nerney under this Act. As to the question of unreasonable delay, that is a matter for the jury when this case comes on for trial. How can we say as Judges that fifteen months is not an unreasonable time? It is not a matter for demurrer at all. I will only add that after the Governor, on behalf of the Queen, has granted his *fiat*, it is only in very clear cases indeed that we should allow a demurrer. How are we to say, when the Crown gives the subject permission to have her right tried by a jury, that her case is not to go down to trial? The suppliant alleges that she has sustained these damages, and the Crown has consented to have the issue tried; are we, except upon the clearest grounds, to say that she shall not go on?

Sir W. MANNING, J. I am sorry to say that on one point the demurrer may be held good, viz.: that there is no statement on the face of the petition that the title has been established. I am bound to state that in my opinion that is a defect in the petition that makes it invalid. At the same time I think it may easily be amended. I think it my duty to go through all the points which have been raised, in the interest of the petitioner, in order that she may know what further course to take. The Court, it seems to me, is bound to decide every ground which is taken by a party demurring, not only for the purpose of the demurrer, but because, if the Court decide that one point is fatal, and confine their decision to that point, the plaintiff may amend so as to meet that point, and yet be overthrown a second time on another of the grounds raised, as to which he has no decision to guide him. I think, in mercy to suitors, this course should be pursued, because our decision on any one of the points will bind this Court on all the subsequent proceedings in the action, and suitors will know their legal position from the very outset.

On one point, and one point only, I hold the demurrer good. First of all, I am not at all prepared to admit that this is a mere case of a contract, in the common law sense of the word. I do not feel myself bound to look at the statements in the petition either with a common law eye or an equity eye, or to regard this as a simple question of contract or no contract. If we look at section 16 of the Act, under which this petition is filed, we find it enacted:—"In the construction of this Act the word 'relief' shall comprehend every species of relief claimed or prayed for in any such petition of right." These words are intended,

in my opinion, to give the subject who has recourse to such a petition the very widest possible relief; and I do not think we should restrict such relief by those rules which, in the course of time, have been established as between party and party, and the rigidity of which is not always conducive to justice.

The first ground is that no contract is disclosed. I think, even if we take the word in its common law sense, there is a contract. The Act itself states that the reclamation had taken place, and that the owners of the land had acquired a right to compensation. It is not as if something remained to be done; the contract was complete, and might properly be the subject of a petition of right.

The second ground is that no breach is set forth. I think it is, laying aside the difficulty about the title not having been established. I think the delay which has elapsed in issuing the grant is quite sufficient evidence of the breach of contract. It appears to me monstrous to say that there must be an absolute refusal on the part of the Crown to constitute a breach. The servants of the Crown in that case would only have to be negligent and do nothing; to put off indefinitely issuing the grant, and to studiously avoid refusing, and there could never be any breach.

Then it is said that no duty on the part of the Crown is shewn. That is answered by what I have already said. I care not whether it is a contract or a duty on the part of the Crown to issue the grant. Whichever it is, there has been a breach; if not a breach of contract, then a breach of duty.

As to the fourth ground, I cannot concur with his Honor the *Chief Justice*. I think under this Act a right was acquired which was alienable. The Act gives to the persons a statutory right to the land—very much in the same way as in old times promises of grants were held to confer transmissible interests. A statutory right is conferred quite as much as under the 13th section of the Crown Lands Alienation Act, under which it has been held that the preliminary steps taken under the statute by a selector conferred a parliamentary title in fee, which, subject to the conditions, would pass to his representatives. And I think that in this case it is only reasonable to hold that the title acquired under the Act may be passed from hand to hand. To hold otherwise would be to prevent these trustees, who may possibly be bound under their trusts to sell, from disposing of the property, and to tie it up during all these delays which have occurred. Further I find in this case that the petitioner has been recognised by the Government, as appears by the third paragraph of the petition. And on what grounds could Brady's trustees, who, it is said, are the proper parties to sue, bring an an action against the Government? They have not suffered from the delay—having parted

with their interest, they were not affected—and they have no claim for compensation.

On the only remaining point—whether there is sufficient allegation of unreasonable delay—we must look at the dates. Here is a statement that in February, 1875, Mrs. Nerney sent in her abstract, and up to the present time no grant has issued. Perhaps it might be more according to common law proceedings that there should be a direct allegation that a reasonable time had elapsed; but if we look at the dates, the statements in the petition are at any rate sufficient on demurrer.

On all the grounds, therefore, but one I think there is no foundation for the demurrer. I think that an amendment might easily be made which would meet the only objection which seems to me a valid one. A very few words would suffice, stating that the petitioner had established a good title; and I can see no objection to such an amendment being made. The case of the *Oriental Bank* v. *The Queen* (*b*) has been referred to, but it does not seem to me in point. There it was held that this Court had no power to amend, after the Governor's *fiat* had issued, by adding a new cause of action as to which he had not granted his *fiat*. But here there would be nothing of that sort. Besides, I find that the 9th section of the Petitions of Right Act gives the Court the same powers of amendment as in other proceedings.

HARGRAVE, J. I at first thought that we were precluded by the decision in the Oriental Bank case from making any amendment at all; but I now think that the suggested amendment might be made in this case.

Sir JAMES MARTIN, C.J. I cannot concur in giving leave to amend.

Demurrer sustained. Leave to amend the petition by stating that the suppliant had established her title.

EX PARTE DUNN. (*a*)

District Courts Act—Summoning Jury—Prohibition or Appeal.

A District Court Judge ordered the twelve jurors directed by s. 54 of the District Courts Act to be summoned for the sittings of the District Court, to be selected by taking every tenth name on the jury list until twelve were obtained. Upon a plaint, which was to be tried by a jury, being called on, the defendant objected that the jury had not been properly summoned. The Judge overruled the objection. Upon motion for a rule *nisi* for a prohibition,

***Held*, that, if the Judge had been wrong, his decision ought to have been questioned by appeal, and not by prohibition.**

(*b*) 6 S.C.R. 273. (*a*) August 31.

The Registrar of the District Court summoned the jury in a way different from that directed by the Judge, and also from that prescribed by the Act 11 Vic., No. 20. This was only ascertained after the trial.

Held, that before coming to the Supreme Court for a prohibition an application ought to have been made to the Judge to grant a new trial on the ground of the improper summoning of the jury.

M. H. Stephen moved for a rule *nisi* for a prohibition directed to *Alfred M'Farland*, Esq., District Court Judge, to restrain further proceedings in an action of *Sheppard* v. *Dunn*, tried before him at Mudgee, at the July sittings of the District Court. Section 54 of the District Courts Act of 1858 provides that, whenever a jury shall be required, the Judge shall cause not less than eight, nor more than twelve, of the persons named in the jurors' book to be summoned as jurors. The affidavit shewed that the Judge had directed the Registrar to summon every tenth man on the list to serve as a juror. It was contended at the trial that the provisions of the Act 11 Vic., No. 20, as to summoning jurors applied to the District Courts, and that as they had not been complied with, these persons were illegally summoned. The Judge overruled the objection, and the cause was tried by a jury of four, selected from the persons who had been summoned, and a verdict given for the plaintiff. After the trial the defendant ascertained that the Registrar had not summoned the jurors in compliance with the Judge's direction, but, "in order to obtain a list, had requested a constable to write any number or figure on a small piece of paper which he might think of, and accordingly the said constable did write on a piece of paper the number 10, and thereupon the said Registrar counted down the said jury list till he came to the tenth name thereon, which was that of John Ahearn; being out of the district of Mudgee, he omitted his name, and then proceeded to the twentieth name, and, that person having been summoned as a juror to the Quarter Sessions held a few days before, he passed him by." He then passed over the 30th, 40th, 50th, 60th, 70th, 80th, 90th, 110th, 120th, 140th, 150th, 160th, 210th, 260th, and 270th names for different reasons, and summoned as jurors the persons whose names were 100th, 130th, 170th, 180th, 190th, 200th, 220th, 230th, 240th, 250th, 35th, and 45th. It was now admitted by counsel for the applicant that no application had since been made to the Judge for a new trial on the ground that the jury had been improperly summoned by the Registrar.

PER CURIAM (*b*). The decision of the Judge that the jury had been properly summoned was a decision on a point of law arising at the trial, and is a matter for appeal, not prohibition. As to the facts which have come to the applicant's knowledge

(*b*) Sir JAMES MARTIN, C.J., FAUCETT & Sir W. MANNING, JJ.

since the trial, an application for a new trial ought to have been made to the Judge upon those facts before coming to this Court.

Rule refused.

Attorney for applicant—*W. Oliver.*

EX PARTE CARRUTHERS. (*a*)

Practice—Articled Clerks.

Where, in consequence of a mistake, an articled clerk was not introduced to the Judges before he was articled, in compliance with the 10th Standing Rule, the Court permitted the introduction to be made *nunc pro tunc.*

Rogers moved that the Court would permit the applicant, who was serving under articles of clerkship to Mr. McCulloch, an attorney of the Court, to be introduced to the Judges *nunc pro tunc.* The Rule requiring the introduction before entering into articles had not been complied with under the mistaken idea that, the applicant being a graduate of the University, it was not necessary in his case.

PER CURIAM (*b*). Order as asked.

THE QUEEN *v.* JENKINS. (*a*)

Criminal Law—Conviction for assault occasioning actual bodily harm, under information charging unlawfully wounding.

The defendant was charged in the information with unlawfully and maliciously wounding one J. B. The Chairman of Quarter Sessions told the jury that the defendant might upon that information be found guilty of an assault occasioning actual bodily harm, and the jury found a verdict accordingly.

Held, that the Act 16 Vic., No. 18, s. 28, did not create new offences, but provided an additional punishment for offences then in existence.

Held, also (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; Sir W. MANNING, J., *dubitante*), that the conviction could not be supported, as the information did not contain a special count for an assault occasioning actual bodily harm.

The defendant was tried before *David Grant Forbes*, Esq., Chairman of Quarter Sessions for the South Western District, at the Quarter Sessions at Wagga Wagga, on an information charging him with having, on the 15th of June, at Goberra-gandra, in the colony of New South Wales, unlawfully and maliciously wounded one James Brogan. The jury, being told

(*a*) August 27. (*b*) Sir JAMES MARTIN, C.J., HARGRAVE & FAUCETT, JJ.
(*a*) August 31.

by the learned Chairman that they could do so, found the defendant guilty of an assault occasioning actual bodily harm, and he was sentenced to three months' imprisonment, with hard labour, and to pay a fine of £100, or in default six months' further imprisonment.

Coutts, for the defendant, wished to argue that the sentence was illegal, and cited *Reg.* v. *White* (*b*) to shew that where the sentence is before the Court, being stated on the case, notice may be taken of it, although no point as to its illegality has been reserved.

PER CURIAM. You had better confine yourself in the first instance to the point reserved.

Coutts. The jury could not find this verdict under an information for unlawfully wounding. There ought to have been a separate count, charging an assault occasioning actual bodily harm, which is a separate offence created by statute. In *Reg.* v. *Oliver* (*c*) there was a count for an assault occasioning actual bodily harm, charging it as a substantive offence. In *Reg.* v. *Yeadon* (*d*) there was a similar count. Where an offence is created by a statute the information should follow the exact words of the statute; it is not sufficient merely to charge an offence which may be equivalent.

Foster, for the Crown. The judgment of Sir *A. Stephen*, C.J., in *Reg.* v. *Burn* (*e*) shews that the 28th section of the 16 Vic. No. 18 was not intended to create new offences, but to impose a more severe punishment on offences already existing. In *Reg.* v. *Taylor* (*f*), *Kelly*, C.B., says:—"On an indictment for a misdemeanour, the jury may find the prisoner guilty of any lesser misdemeanor that is necessarily included in the offence as charged." Here the jury may have negatived malice, or may have thought that the injury inflicted was not, in the legal sense, a wound, and yet have found the defendant guilty of an assault which was really involved in the misdemeanor charged in the information. *Reg.* v. *Taylor* shews that upon an information for unlawfully wounding, the jury may find the defendant guilty of a common assault. Here they virtually do so, but find as an additional fact that the assault was committed under circumstances of aggravation which, under the Act, the Judge is entitled to take into consideration in passing sentence. It is not necessary that it should be charged in the information or found by the jury that the assault did "occasion actual bodily harm;" it is sufficient if the defendant is found guilty of an assault, and

(*b*) 13 S.C.R. 339. (*c*) Bell C.C. 287. (*d*) L. & C. 81. (*e*) 1 S.C.R. 317.
(*f*) L.R. 1 C.C.R. 194.

the Judge is satisfied from the evidence that bodily harm was occasioned. The object of the Act is to distinguish between two classes of common assaults, viz., mere assaults without violence, and those accompanied by actual physical injury. There is nothing inconsistent with the general criminal law in leaving these circumstances of aggravation to the Judge. The 11 Vic., No. 34, s. 11, prescribes the punishment of irons for felonies committed by the offender when armed with any offensive weapon. That punishment is constantly inflicted, but it has never been the practice either to charge in the information that the prisoner was armed, or for the jury to find it as a fact.

Sir JAMES MARTIN, C.J. In this case the defendant was charged with unlawfully and maliciously wounding. The jury found him guilty of an assault occasioning actual bodily harm, and on that finding the Judge sentenced him to a period of imprisonment with hard labour. Several points were reserved at the trial, but the only point which has been argued is whether the Judge was right in telling the jury that they could find such a verdict. During the argument we were referred to section 28 of the Act 16 Vic., No. 18. That section was copied verbatim from an Act of the Imperial Parliament, and authorised the Court whenever any person was convicted of certain misdemeanors there specified (among others, any assault occasioning actual bodily harm), to sentence the offender to be imprisoned for any term warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment. It occurred to me during the argument that this section was intended, not to create any new offences, but to impose a heavier punishment for offences which had been already dealt with either at common law or by statute. In that view I appeared to be confirmed by the judgment of Sir *Alfred Stephen* in *Reg.* v. *Burns*. But I find three reported cases in which the Court of Criminal Appeal in England was of opinion that it was proper to set forth in the indictment a charge of an offence under this section. In *Reg.* v. *Oliver* there were two counts in the indictment, and the second followed the very words of section 28. The question there was whether, the jury having found the defendant guilty of a common assault, the conviction could be supported, and the Court was of opinion that they were entitled to find such a verdict under the second count. That would seem to shew that such a count was a proper one. That case was followed in *Reg.* v. *Yeadon*, where there was a count in a similar form. Upon these authorities I think the section must be regarded as authorising the insertion of a count of that sort. Both these cases were decided before the Criminal Law Consolidation Acts, a

section of which distinctly makes an assault occasioning actual bodily harm a substantive misdemeanor. Before those Acts there were no words in any statute creating such an offence, and in *Reg.* v. *Taylor* reference is especially made by Lord Chief Baron *Kelly* to *Reg.* v. *Yeadon,* as containing a count framed under 14 & 15 Vic., c. 100, s. 29, the very section from which the section now in question was transcribed. It appears to me, then, that by the law of England it is lawful to insert a count charging an assault occasioning actual bodily harm. Before the Act 14 and 15 Vic., c. 100, it was allowable in an indictment for a common assault to set forth the circumstances under which it was committed, such as wounding, ill-treatment, indecency, or the like. It was not always necessary to prove these circumstances of aggravation, but section 28 of the 16 Vic., No. 18, seems intended to apply when those circumstances, or some of them, were proved. This is the only way in which I can make the English cases to which I have referred consistent with the doctrine laid down in *Reg.* v. *Burns,* and, as I think, correctly laid down, that s. 28 was not intended to create any new offences. And I think that the circumstance of aggravation that this assault occasioned actual bodily harm ought to have been set forth in the information in this case. I do not think a Judge ought to have the discretionary power of sentencing a prisoner for something with which he is not charged. I therefore think that the jury were not at liberty to find the verdict which they did, because there was no count in the information charging an assault occasioning actual bodily harm, and on that ground the conviction ought to be set aside.

FAUCETT, J. My impression throughout the argument has been that the finding of the jury in this case amounted to no more than a verdict of guilty of common assault, for the reasons given by his Honor that, in an information for a common assault, circumstances of aggravation might always be set out. I agree with his Honor that the section of the statute to which we have been referred was only intended to add hard labour to the punishment of imprisonment which was already imposed by law on offences then existing. Common assaults had imprisonment attached to them as a penalty; but no Judge, before that statute, however gross a case of assault might be, could add hard labour in the sentence. This statute then affixes that additional punishment to common assaults committed under circumstances of aggravation. The question for us now is, whether under the information in this case the finding of the jury was justified. It is said that if a mere common assault was charged, nothing would appear on the record to justify the Judge in adding hard labour;

but the record is not merely the information, it is the information with the verdict of the jury added. And I should have thought that the finding of the jury (which would be recorded) that this was an assault occasioning actual bodily harm, would be sufficient justification for the Judge. But here are these three English cases deciding that a count for such an assault is a proper count under the statute. I am not disposed to set my opinion against the highest Criminal Court in England, and I think that, if there is any doubt about the matter, the safer and more prudent course to take is to hold that such a count ought to be inserted, and that, as it was not inserted in the present case, the defendant should be discharged.

Sir W. MANNING, J. I am not disposed to actually dissent from their Honors, but I must express serious doubts upon this question. The inclination of my own opinion is contrary to the opinions expressed by their Honors. At the same time, the decision is of no great practical consequence. The Crown will only have, in every information for unlawfully wounding, to add a separate count for an assault occasioning actual bodily harm. That will be the only result of our judgment. The Crown will also, it seems to me, have to take care that, where irons are imposed as the proper punishment, the circumstances which make that punishment applicable are stated in the information. That seems logically to follow from the present decision of the Court, for the 11 Vic., No. 34, s. 1, apparently comes within exactly the same category as the 16 Vic., No. 18, s. 28. But that question is not now before us, and I do not intend to decide the point, but only to express a difficulty which presses upon me at present. I cannot help thinking that the information in this case does actually contain a count for inflicting actual bodily harm, and rather more; for "bodily harm" is surely included in wounding.

Conviction set aside. Defendant ordered to be discharged.

Attorneys for the defendant—*Fitzhardinge & Sons.*

EDDY v. THE BANK OF NEW SOUTH WALES. (a)

Banker and Customer—Dishonour of cheque—Interference with course of post.

The plaintiff sued for the dishonour by the defendants of a cheque for £4. The first count was in the usual terms, and the second count alleged an agreement by the defendants to treat known good cheques paid in by the plaintiff as cash. To the second count the defendants pleaded *non-assumpsit.* The

(a) September 12.

jury found a verdict for the plaintiff on the first count, and for the defendants on all the other issues.

Held (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; Sir W. MANNING, J., *dubitante*), that as the only funds that could have been in the hands of the bank were cheques, and as the jury had found by their verdict on the second count that there was no agreement to treat cheques as cash, there must be a new trial.

Semble (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.), that if, by the orders of a bank, the postmaster keeps letters till called for, a delivery to the post-office must be taken as a delivery to the bank, and the bank cannot set up the defence of not sufficient funds if a letter containing a remittance is lying at the post-office when the cheque dishonoured is presented.

Semble (*per* Sir W. MANNING, J.), that if a customer of a bank sends a cheque and the remittance to meet it by the same post, he is not entitled to complain if the cheque is presented before the remittance is received, and is dishonoured.

The action was brought for the dishonour of the plaintiff's cheque presented for payment at the Branch Bank of New South Wales at Grafton. The plaintiff was living at Dalmorton, and sent by post to a storekeeper named Muirhead, living in Grafton, a cheque for £4, in payment of a debt. By the same post he sent to the Bank of New South Wales, at Grafton, two cheques by Mr. John Frazer, of Sydney, for £50 and £20. The mail from Dalmorton arrived at Grafton at about two o'clock in the afternoon, and Muirhead received the letter enclosing his cheque from the letter-carrier soon afterwards. He immediately paid it into the Commercial Bank to his credit just before the last exchange, and it was presented at the Bank of New South Wales a few minutes before three o'clock, and dishonoured, there being only £2 odd to the plaintiff's credit. The letter with Frazer's cheques had not then reached the bank. It was the practice of the banks in Grafton not to allow their letters to be delivered by the regular carrier, but to send a clerk to the post-office for them. A clerk had been sent from the bank to the post-office at two p.m., when there is a delivery, and plaintiff's letter was not given to him, but after the dishonour it was obtained at the post-office. There was no evidence whether the letter would have reached the bank by the hands of the carrier sooner than it actually did. The declaration in the action contained several counts, the first being for the dishonour of plaintiff's cheque, and the second for breach of an agreement to treat Frazer's cheques as cash. The defendants pleaded to the first count that there were not sufficient funds, and to the second count *non-assumpsit*, and that there were not sufficient funds in their hands from Frazer's cheques. The case was tried at Grafton, before *M. H. Stephen*, Esq., as Acting-Judge. The learned Acting-Judge told the jury that if the bank interfered with the course of post at all, it must be considered in the same position as if the remittance arrived in

due course of post, and left the following questions to the jury:— 1. Was there an agreement to treat Fraser's cheques as cash? 2. Were there sufficient funds at the plaintiff's credit to meet the £4 cheque, treating Fraser's cheques as cash? 3. Was there a reasonable time upon the receipt of the remittance by the post-office to enable the bank to honour the cheque, assuming the bank not to have interfered with the course of post, by reason of which interference the remittance had not arrived in due course? 4. Was there any such interference with the due course of post? 5. Was there any agreement for an overdraft of £20? The jury found a verdict for the plaintiff, with £20 damages, on the first count, and for the defendants on all the other counts. A rule *nisi* for a new trial was obtained on the grounds of misdirection and that the verdict was against evidence, and now came on for argument.

Butler, Q.C., and *Barton* in support of the rule. The case against the defendants is that they delayed the payment to them of cheques which would have reached their hands by the ordinary course of post. But this is not an action of negligence brought against the bank by a customer. In this form of action it cannot be put to the jury whether the bank *ought to have* received the remittances. The only question in an action for dishonour of a cheque is whether there has been a breach of the ordinary contract between banker and customer. *Pott* v. *Clegg* (*b*) and *Hardy* v. *Veasey* (*c*) shew what the obligations of bankers towards their customers are. They have merely to honour the customer's cheques when there are sufficient funds *actually in the bank* to meet them. The question is, not what funds ought to have been there, but what were actually there. The usage of sending to the post-office for letters, instead of trusting them to letter-carriers, is adopted in the interest of the customer, and he must be taken to have contracted with a view to such a usage.

Darley and *Heydon* shew cause. The duty of bankers to honour their customers' cheques is laid down in *Marzetti* v. *Williams* (*d*). On the principle of that case, it is clear that if a reasonable time elapsed to enable the defendants to have assets of the plaintiff in their hands sufficient to meet his cheques, they are liable in an action for dishonouring them. There are no cases directly in point with respect to the course of dealing between the bank and the post-office, but *Darbishire* v. *Parker* (*e*) and *Bankcroft* v. *Hall* (*f*) shew that a person who interferes with the course of post must suffer. In *Abrey* v. *Crux* (*g*), *Willes*, J., says:—"I do not see why we should not

(*b*) 16 M. & W. 321. (*c*) L.R. 3 Ex. 107. (*d*) 1 B. & Ad. 415. (*e*) 6 East. 3. (*f*) Holt N.P. 476. (*g*) L.R. 5 C.P. 45.

in a novel case, to which no distinct law is applicable, rather follow the justice of the case than strive to bring the case within a principle which will defeat justice." The plea of not sufficient funds does not mean that the money is not entered in the books, or even that it is not within the four walls of the bank; it means that sufficient funds were not delivered to the bank. Here there was a constructive delivery. By the course taken, the post-office was made a part of the Bank of New South Wales, and delivery there was delivery at the bank.

Butler, in reply. The finding of the jury on the second count shews that there was no agreement to treat cheques as cash. There being no obligation to do so in the absence of a special agreement, the plaintiff is clearly out of Court. [He was stopped by the Court.]

Sir JAMES MARTIN, C.J. This action was brought to recover damages for the dishonour of a cheque. There are several counts in the declaration, and at the trial all the issues except those raised on the first count, were found for the defendants. Among the other counts in the declaration, the second count set forth an agreement between the plaintiff and the defendants that all known good cheques paid in by the plaintiff would be treated as cash, and would be passed to the plaintiff's credit without waiting for their collection. Issue was taken by the defendants on that agreement, and the jury, in finding all the issues except those raised on the first count for the defendants, necessarily found in their favour that there was no such agreement. The law, with reference to the duty of bankers towards their customers, is quite plain. Bankers are not only bound to return the money entrusted to them by a customer, but to honour all cheques drawn by him within a reasonable time after sufficient money to meet them has been paid into the bank. That law was first laid down in the case of *Marzetti* v. *Williams*. But the principle there stated as to reasonable time allows a latitude to the banker, which, it seems to me, would scarcely be allowed at the present day. One would almost infer from that case that the clerk to whom a cheque is presented need not inquire till the end of the day whether there are sufficient funds of the customer in the bank to meet the cheque. But it would seem to me that a reasonable time would be just sufficient time to examine the receiving teller's ledger, and to see whether sufficient funds to satisfy the cheque had been paid in. But that question does not arise here, because, even if we regard the delivery at the post-office in Grafton of the cheques remitted to the plaintiff's credit as a delivery at the bank, still there was no delivery of *money*,

because the jury have found that there was no agreement on the part of the bank to treat cheques as cash. It is not necessary, in the view that I take, to offer any opinion as to the point which has been argued whether delivery at the post-office is delivery to the bank, but I am disposed to think that it was. I am disposed to agree with Mr. *Heydon's* argument that if the bank stopped delivery and interfered with the regular course of post, it was the same as if the post-office were a part of the bank. But I decide that there ought to be a new trial on the ground that, as the jury have found that there was no agreement to treat cheques as cash, and as, confessedly, there were not sufficient funds without the remitted cheques to meet the cheque for £4, the plaintiff was not entitled to succeed upon the first count, which alleged a wrongful dishonouring of the cheque by the defendants.

HARGRAVE, J. I must assume that the verdict for the defendants on the issues raised on the second count was a verdict for them on both the issues, viz., whether there was the alleged agreement, and whether that agreement was broken. The law is perfectly clear on the questions that have been argued. A banker must honour his customer's cheque if he has funds in the bank; and by "funds in the bank" is meant money, not only actually, physically, in the bank, but money which is in the banker's control or within his power. It is quite clear to my mind that money that the banker has in a box at the post-office, where it is kept by his orders, is exactly the same as money in a box in the bank, and that the banker is bound to deal in the same way with his customer as if that money were in the bank. Another very important question has been raised in this case, whether the practice of exchanges between the different banks makes any difference as to the reasonable time allowed to the customer before dishonour. There is no case in point, but it seems to me that the fact that there are several exchanges in the day ought not to cut down the reasonable time to which the customer is entitled before his cheque is dishonoured. I concur, with very great regret, in making this rule absolute, because I think that the merits were entirely with the plaintiff.

Sir W. MANNING, J. I concur in granting a new trial, though I feel considerable doubt upon the argument based on the verdict of the jury on the second count; because it seems to me necessarily contradictory to the verdict on the first count. Therefore, if the matter rested here, I should be sorry to found my judgment on what seems to me to have been a merely formal finding. The jury found the main issue in favour of the plaintiff, and the other issues were probably left to them as mere matters of form. But, on other grounds, I am more inclined to think that the

verdict was not a good one. This action, though in form an action on a contract, is really more one of tort. The cause of action is substantially negligence by a depositary. What are the facts in this case? The first thing is that a person sends money by the same post as he sends cheques drawn against it. Why cannot a man wait till the next day before drawing his cheques? It seems to me that by adopting this course he exposes the bank to too great a risk. Are bankers to be treated as *virtually* tort-feasors (not forgetting that this is *in form* an action of contract) because, by a chance which the plaintiff might have foreseen, one letter happens to be received before the other? I do not think that banks ought to be driven into such a position; and if the plaintiff has been injured, he has only himself to thank for it. If he chooses to run a thing so fine as this, he must suffer the consequences. He must be taken to have known the custom of exchanges, and it was only reasonable to suppose that the payee would take off the cheque at once to his bank. I must not be taken to give in to the opinions which have been expressed as to the effect of the arrangement between the bank and the post office. I find that such an arrangement prevails in England, and, on reference to the official Postal Guide, I see that the practice of having private letter-boxes is sanctioned here by the Government. And in what capacity do the banks adopt this practice? It appears to me that it is as agents for their customers, in transacting the business of their customers, and for the benefit of their customers. I may be wrong in supposing that the bulk of the business done by banks through the post is in the interest of their customers—in a certain sense they use the post for their own interest—still most of the cheques or bills sent by post to banks go to the credit of the customers, and they are quite as much interested as the banks in having letters safely transmitted. And if the banks follow a well-known and approved practice, and think it for the benefit of their customers not to trust letters containing valuable papers to the regular letter-carriers, are they to be treated as wrong-doers, because in some particular case a particular customer suffers, and, as here, more from his own fault than that of the bank? This is a very important question as to which our decision might alter the whole course of practice of banks throughout the country. I do not decide it now, but will wait until it comes properly before us; and I am only stating, subject to future argument, the present inclination of my opinion.

Rule absolute for a new trial of the issues found for the plaintiff. No order as to costs.

Attorney for the plaintiff—*F. Norrie.*

Attorneys for the defendants—*Allen, Bowden, & Allen.*

SEAMER *v.* MANNING. (*a*)

Equitable plea—Promissory note—Agreement to stay proceedings—Consideration.

To a declaration on a promissory note by payee against maker, the defendant pleaded on equitable grounds that the plaintiff agreed with him to stay all proceedings in the action, and instructed his attorney to that effect, on the defendant agreeing to pay all the expenses incurred by the plaintiff in the action up to the time of the agreement, together with the amount due to the plaintiff, in full, immediately on the sale of a steamer belonging to the defendant, and that the defendant was always ready and willing to carry out his agreement.

On demurrer, *held* a bad plea.

DECLARATION. Promissory note, at four months, for £60 11s. 8d., made by the defendant in favour of the plaintiff. Goods sold and delivered, goods bargained and sold, and accounts stated.

PLEA (on equitable grounds). That, before and at the time of the agreement hereinafter mentioned, the defendant was a shipowner carrying on business in Sydney, in the colony of New South Wales, and was possessed of a certain steamer called the "Grafton," then in the hands of certain shipwrights, and by the sale of which, when completed, the defendant expected to realise a large sum of money, and to be thereby in a position to pay the plaintiff and other his creditors the amounts respectively due to them in full; and the plaintiff, well knowing the premises, and that a pressure by any one such creditor would compel the defendant to sequestrate his estate for the benefit of his creditors generally, and greatly interfere with a successful sale of the said steamer, agreed with the defendant to stay all proceedings in this action, and did instruct his attorney to that effect, on the defendant agreeing on his part, as he then did, to pay all the expenses incurred by the plaintiff in the said action up to such time, together with the amount due to the plaintiff, in full, immediately on the sale of the said steamer. Averment, that the defendant has always been, and still is ready and willing to carry out the agreement on his part, and has endeavoured, though as yet without success, to sell the said steamer, and has done nothing to entitle the plaintiff to abandon the said agreement on his part, as the plaintiff well knew; yet the plaintiff has threatened to sign judgment herein against the defendant unless he pleads to the declaration filed herein without further delay, and has thereby broken the said agreement.

(*a*) September 13.

DEMURRER.

Healy, in support of the demurrer, was stopped by the Court.

C. B. Stephen, in support of the plea, cited *Smith's Leading Cases* (*b*), *Cooper* v. *Parker* (*c*), *Callisher* v. *Bischoffsheim* (*d*), *Edwards* v. *Baugh* (*e*), *Wilkinson* v. *Byers* (*f*), *Reynolds* v. *Pinhowe* (*g*), *Wade* v. *Simeon* (*h*). A legal possibility of advantage is sufficient consideration. The steamer might have been sold the next day, and the plaintiff would then receive his debt sooner than if he proceeded in the action.

Healy was not called upon in reply.

PER CURIAM (*i*). The case is too clear for argument. The defendant agrees to pay at an indefinite time what he is bound to pay at once. That is no consideration for an agreement. Besides, no agreement to sell the steamer is alleged. If there had been a clear and definite agreement, equity might possibly restrain the action until sale; but the rule as to equitable pleas is that they must shew facts which would entitle the defendant to a perpetual and unconditional injunction.

Judgment for plaintiff.

Attorney for plaintiff—*C. A. Farrell.*

Attorneys for defendant—*Gannon and McLaughlin.*

MEYMOTT *v.* PIDDINGTON. (*a*)

District Court Judge—Right of Government to make deductions from his salary—District Courts Act of 1858*—Claims against the Colonial Government Act*, 39 *Vic., No.* 38.

Plaintiff, a District Court Judge, sued the Colonial Treasurer (as nominal defendant) for a portion of his salary as such Judge. The defendant pleaded that the plaintiff was not ready and willing to, and did not, in fact, render his services as District Court Judge; and, also, by way of cross action, that the plaintiff neglected and refused to perform his duties, by reason whereof the Government was compelled to employ a barrister to perform the plaintiff's duties in his place.

On demurrer, *held* (by Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dissentiente*), that these pleas were no defence to the action.

Per HARGRAVE, J.: The pleas are good because they shew that the plaintiff's claim was not "just" within the terms of s. 1 of the Claims against the Colonial Government Act.

DECLARATION. Frederick William Meymott, by Joseph Palmer Abbott, his attorney, sues William Richman Piddington, the

(*b*) p. 349, edition. (*c*) 15 C.B. 822. (*d*) L.R. 5 Q.B. 449. (*e*) 11 M. & W. 641. (*f*) 1 A. & E. 106. (*g*) Cro. Eliz. 429. (*h*) 2 C.B. 548. (*i*) Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.

(*a*) August 14.

Colonial Treasurer (*b*) of the colony of New South Wales, who is duly appointed and liable under and by virtue of the "Claims against the Colonial Government Act," to be sued as nominal defendant in an action against the Government of the said colony, the plaintiff having duly set forth a just claim, being the grounds of action hereinafter set forth, against the said Government in a petition which was presented to the Governor more than a month previous to the commencement of this action, praying him to appoint a nominal defendant in the matter of such petition, and the Governor, with the advice of the Executive Council, not having within one month after the presentation of such petition, by notification in the *Gazette*, appointed any person resident in the said colony to be a nominal defendant; for that before the accruing of the causes of action hereinafter mentioned, the Governor with the advice of the Executive Council, by commission in Her Majesty's name, duly appointed the plaintiff to be one of the Judges of the District Courts under and by virtue of the District Courts Act of 1858; and the plaintiff, at the time of the accruing of the said causes of action, held the said appointment, and by virtue thereof continued in the said office of District Court Judge under the said Act, and thereupon under the said Act the plaintiff as such District Court Judge became and was entitled to be paid by the said Government while holding his said office (exclusive of any allowance for travelling expenses) an annual salary not less than the sum of £1000, not to be diminished during the continuance of the plaintiff in the office of such Judge; and the plaintiff says that, by the custom and course of business of the public service of the said colony, the said annual salary, together with other salaries and payments authorised by the said District Courts Act of 1858, was appropriated and directed to be paid out of the Consolidated Revenue Fund by an Act or Acts of Parliament passed by the Legislature of the said colony for that purpose in each year, and thereupon the said annual salary became payable in monthly payments by the said Government to the plaintiff, and it became and was the duty of the said Government, on the appropriation by Act of Parliament as aforesaid of the said annual salary, to pay the same by monthly payments in each month to the plaintiff, whilst the plaintiff held the said office, and not to diminish the amount thereof during the plaintiff's continuance in the same. And the

(*b*) Mr. Piddington had ceased to be Colonial Treasurer before the date of this argument, but the question was not raised whether, under the Claims against the Government Act, the action could proceed against him, or whether the Colonial Treasurer for the time being should be substituted as nominal defendant.

plaintiff says that, at the time of the breach of duty hereinafter alleged, and while the plaintiff held such office of District Court Judge as aforesaid, his said annual salary had been appropriated by Act of Parliament as aforesaid, and he was holding this said office and was continuing therein, yet the said Government, neglecting their duty in that behalf, wrongfully refused to make, and did not make, certain of the said monthly payments of the said annual salary of the plaintiff, then due to the plaintiff, and thereby diminished the said annual salary of the plaintiff, contrary to the said District Courts Act of 1858, and part of such annual salary still remains due, and by means of the premises the plaintiff has lost the use of the said payments and has incurred expense in endeavouring to have the same made to him, and has been otherwise injured.

2. Count for wrongfully diminishing the plaintiff's annual salary as Judge below the sum of £1000, and wrongfully paying to the plaintiff as his salary a sum less than £1000.

Money counts for money had and received and money due on accounts stated.

PLEAS. 1. (To the first count): That the plaintiff was not ready and willing to, and did not, in fact, render his services as such District Court Judge, as required by the District Courts Act of 1858, to entitle him to receive the said monthly payment alleged in the said count to be due and unpaid to the plaintiff.

2. (To the second count): That the plaintiff was not ready and willing, and did not, in fact, render his services as such District Court Judge as aforesaid, as required by the said Act, to entitle him to receive the difference between the sum of £1000 and the sum paid to the plaintiff by the Government.

3. (By way of cross action): That the claim of the plaintiff, sued for in the third count, is identical with the claims sued for in the first and second counts, and that the plaintiff, during the time in respect whereof the said alleged salary accrued due, neglected and refused to perform his duties as such District Court Judge, by reason whereof the Government was compelled to and did incur great expense in employing a barrister-at-law to perform the duties of a District Court Judge in the stead of the plaintiff; and that the expense which the said Government has incurred by reason of such neglect of duty on the part of plaintiff is equal to the plaintiff's claim, against which the said Government is willing to set off the said expense so incurred as aforesaid.

DEMURRER, on the grounds that, inasmuch as the plea admits that the plaintiff was in fact a Judge of the District Court at the time his salary became due and payable, it is immaterial to consider

whether he did, in fact, render his services as a District Court Judge or no; that the Government have no power to reduce or in any way affect the salary of a District Court Judge; that, so long as the plaintiff remains in his said office, he is entitled to be paid his full salary without diminution; that the claim of the plaintiff and the cross claim of the Government do not arise out of the same subject matter.

The 29th section of the District Courts Act of 1858 (22 Vic., No. 18) regulates the tenure of office and salary of the District Court Judges, and is in the following terms:—The Judges of the said District Courts shall hold their offices during ability and good behaviour, and shall severally be paid (exclusive of any allowance for travelling expenses) an annual salary not less than £1000, which sum shall not be diminished during the continuance of such person in the office of District Court Judge; but it shall be lawful for the Governor, with the advice of the Executive Council, to remove any Judge for inability or misbehaviour.

Darley (*Butler*, Q.C., with him) in support of the demurrer. It is well established that a salary given for judicial services cannot even be assigned by the holder of the office himself. It is not only given as remuneration for services rendered, but to enable the recipient to maintain the dignity of his office, and it is contrary to public policy that it should be dealt with in any way. *Arbuihnot* v. *Norton* (*c*), and *Davis* v. *Duke of Marlborough* (*d*), lay down the general principle. *Slingsby's case* (*e*) is a very strong authority. There it was held that notwithstanding the suspension of a public officer his salary continued. *Grenfell* v. *The Dean of Windsor* (*f*) is another case in point. Here the Government having given the salary to the plaintiff could not give it to any one else during his tenure of office. That appears from the old case of *Oliver* v. *Emsonne* (*g*), where it is said: "If a man were created Duke, and for the maintenance of his dignity the King granted him £20 as an annuity, he could not grant that to any other, for it is incidental to his dignity." This passage is cited with approval by *Macdonald*, C.B., in *Stowe* v. *Lidderdale* (*h*). The same doctrine is stated in *Gibson* v. *The East India Company* (*i*), and *Corporation of Liverpool* v. *Wright* (*j*). It would be very dangerous if the Government had any such power as is claimed. The Government may remove for misbehaviour, but has no power of tampering with a Judge's salary. The Act says expressly that the salary shall not be diminished. The plea of cross-action here does not allege that the cause of the cross-action

(*c*) 5 Moo. P. C. 219. (*d*) 1 Swanst. 74. (*e*) 3 Swanst. 178. (*f*) 12 Beav. 544. (*g*) 1 Dyer 1 b. (*h*) 2 Anst. 539. (*i*) 2 Bing. N. C. 262. (*j*) John 359; 28 L.J. Ch. 288.

arose out of the same subject matter as the plaintiff's claim. This is necessary: *Dibbs* v. *Newcastle Coal and Copper Company* (*k*); *Zimmler* v. *Manning* (*l*).

M. H. Stephen in support of the pleas. None of the cases as to the assignment of salaries can affect the question raised here. But even assuming that the Government has no power to diminish the salaries of District Court Judges, there still remains the question whether the plea of cross-action is not good. By that it is not sought to diminish the salary, and it admits that the salary is fully due, but sets up a counter-claim of the Government. A set-off does not deny, but admits the debt sued upon, and it is the same with a plea of cross-action. There is nothing in the objection that the matter alleged in the pleas does not arise out of the same subject matter. Every day a similar defence is pleaded in actions brought by servants for wages, viz., that the servant has conducted himself so negligently that the employer has been put to expense. There, though the declaration is in contract, the plea of cross-action is in tort, and no one has ever doubted that it is a perfectly good plea. There is also the plea of negligence by way of cross-action in answer to an action upon an attorney's bill. In this case the plaintiff finds fault with the Government for dealing leniently with him. Instead of his being removed for his admitted misconduct, a portion of his salary is taken away. Under the Act under which this action is brought, these pleadings should be looked at in the same light as if this were an ordinary case of master and servant. This is not "a just claim or demand," for the plaintiff admits that he would not do the work for which he was to receive the money.

Darley, in reply.

Sir JAMES MARTIN, C.J. This action is brought by the plaintiff, one of the District Court Judges, against the Government, under the provisions of a recent Act, to recover a certain portion of his salary as Judge, which he alleges has been improperly withheld from him. The cause of action is set forth in different ways in three counts, but it is substantially the same in each. All the pleas except the last allege that the plaintiff did not in fact render the services which as Judge he was bound to perform; and the third plea sets up, by way of cross-action, that the Government were put to expense in employing a barrister to act as Judge in consequence of the neglect by the plaintiff of his duties. To these pleas the plaintiff has demurred.

Now by the 29th section of the District Courts Act, by which the office of District Court Judge was called into existence and power was given to the Governor, with the advice of the Executive

(*k*) 1 S. C. R. 248. (*l*) 2 S. C. R. 235.

Council to appoint such Judges, it is provided that "the Judges of the said District Courts shall hold their offices during ability and good behaviour, and shall severally be paid (exclusive of any allowance for travelling expenses) an annual salary not less than £1000, which sum shall not be diminished during the continuance of such person in the office of District Court Judge." Under that section it is contended on behalf of the plaintiff that so long as he holds the office he is entitled to be paid the whole salary that Parliament has awarded. A power is conferred in the same section on the Governor and Executive Council to remove a Judge for inability or misbehaviour; and we have now to determine whether the Government, not removing the plaintiff from his office of Judge, can take the milder course of reducing his salary.

We have been referred in the argument to a great number of cases, some of which have no application, or very little, to the question now before us. I speak of the cases in which it has been held that officers in the army and other public servants receiving salaries cannot assign or incumber those salaries. The ground there put is that these salaries are given, not only for the remuneration of the officer, but for the purpose of enabling him to support the dignity of the office, and that it is contrary to public policy to allow a person, by parting with his income, to lower the consideration of the office he holds. But I do not think those cases have much to do with the question. Its decision depends, it seems to me, on other considerations altogether.

We are all aware of the great change in the position of the Judges of England which took place in the reign of William III. By the Act of Settlement their commissions were granted during good behaviour, and not, as had formerly been the case, during the pleasure of the Crown. All writers on the British Constitution have pointed out as one of its great and peculiar distinctions that the Judges have their offices independent and their salaries fixed and placed beyond the power of any interference except by Parliament. No point in our Constitution has been more insisted on to the credit of those who framed it in its present form than the independence of the Judges. Contrasts have been drawn between the mode in which justice has been administered by the Judges in the mother country and the mode in other countries. At no time during the past century has anyone ventured to charge any of these high functionaries with corruption or partiality. Errors, of course, they have committed, but their integrity has never been impeached. They occupy a far higher position than the Judges in that other great country where the English language is spoken and English institutions are to a

great extent copied and followed, but where the Judges hold their offices on a far less secure tenure. No comparison can be drawn between the Courts of Justice in England and America so far as the manner of administering justice is concerned.

We have followed in this colony the same principles in the appointment of our Judges as prevail in the mother country. We are no longer in the position of a Crown colony, where the Judges are under the control of the Secretary of State for the time being, and may be removed at pleasure. So far as the Judges of the Supreme Court are concerned, we are as secure in the tenure of our offices as any of the Judges of the superior Courts in England.

In the case of the District Court Judges much the same principle has been carried out. They are removable by a less distinguished tribunal, but only for inability or misbehaviour, and the only difference between them and ourselves is that they may be removed by the Governor and Executive Council, while a Judge of the Supreme Court can only be removed by the Queen upon the address of both Houses of the Legislature. The salaries are fixed just as much in one case as in the other. And it is to secure the independence of the Judges that their salaries have been fixed, and that the Legislature has said that those salaries shall not be diminished. It seems to me that the Government is absolutely prohibited from reducing the salaries of those Judges for any cause whatever. If it has the power of reducing at all, it may make the salaries less by any sum up to the whole amount, and it will virtually be in the power of the Government to say whether a Judge shall be paid at all or not. It is easy to imagine, if this power is held to belong to the Government, that the Government might so increase the duties of a District Court Judge as to make it next to impossible for him to perform them. The gentlemen who hold these offices are not, as a rule, young men, and when they have held office for a time are generally advanced in years; the offices are not highly paid, and the duties required to be performed are sometimes very severe; and I can understand a Government making most unreasonable requirements, afterwards accusing the Judge of negligence because he cannot comply with them, and, without any appeal, or without giving him the right of being heard, reducing his salary for the alleged negligence. If a Government can do that by getting up a case of negligence against a Judge, it may do it in other cases, and the Judge's salary is liable to be dealt with, not by parliamentary sanction, but by the mere action of the Government. Parliament has said that it is not to be done at all. This is not the way to deal with misbehaviour on the part of the Judges—

the only way is to remove them. It may be said that the course adopted in this case was a much milder one than actual removal, and that the Judge was dealt with most mercifully. But the question before us is not how the power has been exercised, but whether it exists; and I am of opinion that there is no such power.

The reasons I have just given apply, in my opinion, with equal force to the last plea. If the Government cannot withdraw the salary or diminish it, it must be paid in full; and the 3rd plea seems to raise only the same question in another form.

I am of opinion that the Government, not having removed the plaintiff, but having done precisely what the Legislature has said is not to be done, has acted without authority; that these pleas do not justify the course complained of, and that our judgment on these demurrers should be for the plaintiff.

HARGRAVE, J. This is a very important case. I agree with all that has been said in favour of the independence of our Judges; no one can hold more strongly than I do to that great constitutional principle; but, at the same time, I cannot displace other principles which are equally binding and, in my opinion, ought to decide this case. And the first principle is that the salaries of these Judges are given, not as a mere *honorarium*, not, as has been put in argument, merely to support the dignity of the office, but as payment for the performance of services. Then, under the Act under which this action is brought, the pleadings must be construed as between subject and subject. Mr. Meymott in this case comes into Court and says, "Upon the ordinary principles of law which govern cases between subject and subject, between employer and employee, I have a just claim against the Government." How can we say that, as a Judge, he is entitled to say to his employer: "I was to receive a salary in consideration of certain services rendered; I am unwilling and refuse to render those services; but you must pay me the whole of my salary." If the Queen is to be treated as a subject in these cases, how is any subject to come into Court, not as a mere subject, but clothed with all the dignity of an irresponsible Judge? If the Crown lays aside its prerogative, and condescends to be sued in the same manner as any of its subjects, then this case must be stripped of its constitutional bearings, and decided upon the same principles as govern actions between private individuals.

But, further, this Act speaks of any "*just* claim or demand." We have to decide the *justice* of this case, and I say that the justice is clearly against Mr. Meymott. We have now to decide this great point to guide us not only in regard to District Court Judges, but to Police Magistrates throughout the whole colony;

and how can we say: "You may continue to hold your office, and draw your salary, and yet you need not perform the services; you may even *be unwilling* and *refuse* (as this plaintiff has admitted in these pleadings he is) to perform them?" I am clearly of this opinion, on Mr. *Darley's* own shewing and the cases he has cited. The general principle of all those cases is that there must be a willingness to perform the duties of the office; they all rest upon readiness and willingness. A public officer may be entitled to his salary when under suspension; but that is a very different matter from this; there he is perfectly willing to fulfil the requirements of the office, but is not allowed to. But where can we find any authority for holding that a public servant who *absolutely refuses* to do his duty, is to receive the income attached to his office?

And the plea of cross-action makes out a much stronger case still. There is a duplication of the mischief caused by the gentleman's neglect of duty, if not only the plaintiff is to receive his full annual salary for work which he has not done, but another gentleman must be employed, and, of course, paid for taking his place. On these pleadings I can see no answer whatever to the plea of cross-action. If the arguments against the plea are good for a month, they are good for the whole year; and then look at the extreme injustice of it. The plaintiff does not do the work, the Crown has to pay another gentleman, and there are to be two yearly salaries instead of one.

With every disposition of my nature to maintain to the fullest extent the perfect independence of all our Judges, I cannot see that that great constitutional principle is touched here. My only doubt in this case arises from what is said in the statute that the salaries "shall not be diminished." But that does not apply to the plea of cross-action, and that plea I think is clearly good. I think the demurrers should be overruled.

FAUCETT, J. I have listened most attentively to the arguments of counsel on both sides, and to the judgments of both their Honors, and, after the fullest consideration, I am of opinion that this demurrer should be sustained. I think it is to be regretted that this action was ever brought into Court at all, but, it being now before us, we have only to pronounce our decision upon the questions submitted to us.

I agree with all that his Honor the *Chief Justice* has said about the independence of the Judges, and the principle applies, it seems to me, as well to the District Court Judges as to the Judges of the Supreme Court. The Legislature clearly intended this to be the case. The Act says that a District Court Judge shall be removable by the Governor and Executive Council, and

that it shall not be necessary in their case to go through the higher form of an address of both houses of Parliament, which is necessary for the removal of a Judge of this Court. Still the only cause for which a District Court Judge is removable is inability or misbehaviour, and the only remedy provided is removal. I think it is well that it should be generally known that one of these Judges, if guilty of misconduct, can be dealt with only by removal, the Legislature not having sanctioned any other way of punishing such a Judge for misbehaviour. I have no hesitation in saying that I willingly undertake the responsibility of the course we are pursuing in deciding against the power now claimed by the Government, and I think that any other course would be dangerous to the administration of justice in this colony. I cannot imagine anything more dangerous than to say that the Judges are subject to the jurisdiction of the Executive Council any further than the law expressly directs.

It appears to me settled, on the authority of the cases cited, that the salaries of judicial officers are not only given as remuneration for the performance of services. Of course they are given for that purpose; but the constitutional principle is that salaries are intended, not merely for the proper discharge of duties, but to enable the recipient to maintain the dignity of his office, and that they are not to be interfered with for any cause whatever. And it appears to me essential to the proper administration of justice that the District Court Judges should maintain a certain amount of dignity. I say these cases shew that an officer ought not to be deprived of his salary even during suspension. In one of the cases cited the officer had been suspended for proper cause, and yet it was held that he was entitled during his suspension to his salary.

If we hold these pleas to be good, a Judge may be ill and unable to hold his Courts, and because another person is appointed by the Government to act in his place, he must pay out of his salary the expense incurred. A special power is given by the Act to the Government to appoint a temporary Judge under certain circumstances. The 30th section provides that in case of illness or absence it shall be lawful for the Governor, with the advice of the Executive Council, to appoint some other person, with qualifications specified in the section, to act as the deputy of any District Court Judge. But does the Act further say that the deputy shall be paid out of the Judge's salary? In the present case the Government complied with the provisions of the Legislature and appointed a deputy, and the Legislature will of course vote the remuneration for the person so appointed.

On the words of the statute and on the high constitutional grounds, as to which I entirely agree with his Honor, I think the

Government does not possess the power contended for. But it is not always safe to decide points of law entirely upon constitutional grounds, and I prefer to go upon the law. In my view, whatever is in accordance with law is *just*, so far as our decisions are concerned, and it is safer to go upon the law than to decide upon indefinite ideas of justice. The Act giving a remedy against the Crown must be taken, I think, to mean by a "just claim" nothing more than a legal claim, a claim which—if it were not against the Crown—might be enforced by law, and which should be dealt with on the ordinary principles of law.

The first and second pleas are, in my opinion, clearly bad for the reasons I have already given. As to the fourth, I confess I feel some difficulty. We must give effect to the allegation that the plaintiff wilfully neglected his duty, and it certainly seems hard that he should recover in this Court the proportion of his salary accruing due for the time during which he neglected his duty. But what does the plea really amount to? The Government says:—"We are bound by law to pay your salary, but we will not pay it; we keep it back *because we employed another Judge in your place and paid him.* We will take a roundabout way of diminishing your salary, though we admit that you are entitled to be paid in full, and will say that we have a claim against you for this other matter." Is the plea really anything else than the first and second pleas in another form?

The Judges of the District Court can only be punished in one way—by absolute removal. I have no doubt that the Government acted with great leniency to this officer, but that has nothing to do with the question we have to determine. Upon the strict rights of these parties according to law, and independently of the constitutional question involved, I think the demurrer should be sustained.

Judgment for the plaintiff.

Attorneys for the plaintiff—*Cape and Westgarth.*
Attorney for the defendant—*Williams* (Crown Solicitor).

EX PARTE PENNINGTON AND OTHERS. (a) RE MEREDITH'S CAVEAT.

Caveat—"Taking Proceedings"—Real Property Act 1862, *ss.* 21, 82.

A caveat under the Real Property Act 1862 was lodged on the 21st of January, 1876. A writ of summons was issued on the 28th of April following, and was renewed from time to time, but was never served.

Under these circumstances a rule *nisi* to remove the caveat under s. 82 of the Real Property Act was made absolute with costs.

This was an application under section 82 of the Real Property Act (26 Vic., No. 9) to make absolute a rule *nisi* calling on William Meredith to shew cause why a caveat filed by him in the office of the Registrar-General against an application by the trustees under the Underwood Estates Acts to bring certain land at Homebush under the provisions of the Real Property Act should not be removed.

The trustees having made application to bring certain land, portion of the Underwood Estates, under the provisions of the 26 Vic., No. 9, a caveat was lodged under section 21 of the Act by William Meredith, who alleged that he was in occupation of the land, restraining them from further dealing with it. This caveat was lodged with the Registrar-General on the 29th January, 1876. As a commencement of proceedings for establishing his title to the land under section 23 of the Act, the caveator issued a writ on the 28th April, 1876, which was never served. This was renewed on the 28th July, 1876, by another writ, which was never served. No præcipe had been taken out previous to the issue of the second writ. There were several subsequent renewals, also without any notice to the applicants.

M. H. Stephen, in support of the rule. The renewal of these writs cannot be looked upon as a commencement of proceedings contemplated by the section 23. Even if they could be so regarded, the renewal is informal for want of a præcipe: *Holloway* v. *Rutledge* (*b*). The renewal is a day too late: *Anonymous case* (*c*).

Paterson shewed cause. The writ is on the face of it regular; and it being the act of the officer of the Court, the Court will presume that it has been regularly issued. Even though the writ had not been renewed in time, the Court would not remove the caveat, but would make an order similar to that in *Ex parte McIntosh* (*d*). He also cited *Ex parte Hamilton* (*e*).

Sir JAMES MARTIN, C.J. By the 23rd section of the Act it is enacted that after the expiration of three months from the

(*a*) September 20. (*b*) 1 S.C.R. 15. (*c*) 32 L.J. Ex. 88. (*d*) 10 S.C.R. 146. (*e*) 3 S.C.R. 315.

Registrar-General's receipt of the caveat, the caveat shall be deemed to have lapsed, unless the caveator shall within that time have taken proceedings in a Court of competent jurisdiction to establish his title to the land. By that section a person lodging a caveat has the duty imposed on him of bringing an action, on peril of losing his caveat. Section 82, which uses the words "such caveat," and would at first sight appear to apply to the caveator mentioned in the previous section, has been decided in *Ex parte McIntosh* (cited in the argument) to apply to all caveats under the Act. That section enacts that the Registrar shall give notice of the lodging of a caveat to the person against whom it is lodged, that that person may summon the caveator to shew cause why the caveat should not be removed, and that the Court, on proof that the caveator has been so summoned, may make such order in the premises as it deems fit. It is under that power that our action is invoked. We are dealing now with a rule *nisi* to shew cause why the caveat should not be removed. The writ was issued seventeen months ago, and has never been served. It has been renewed several times, but, it is said, irregularly; it being alleged that the præcipes have not been filed. It is not now necessary to determine whether or not the præcipes need have been filed, as I am of opinion that the period elapsed since the lodging of the caveat is so long that the caveat should be removed. It would appear from the affidavits that the caveator has no title to the land. I think, therefore, that this is not a case for an order similar to that made in *McIntosh's case*. The rule should be made absolute with costs.

HARGRAVE, J. I am of the same opinion. The object of allowing persons to lodge caveats under this Act was to give them time to produce evidence for the recovery of their property and proof of their titles; not to delay the issuing of certificates to persons applying for them. The neglect of the caveator in so long delaying to proceed in establishing his title is now confirmed by the want of title which appears on his own affidavit. The rule must be made absolute with costs.

FAUCETT, J. I am of the same opinion, on the ground that the negligence of the caveator has disentitled him to have the caveat kept alive. Supposing even the writ had been regularly and in due time renewed, I do not think this can be said to be "*proceeding*," within the meaning of the twenty-third section. It is no answer that the caveator was too poor to proceed, as he might have applied to the Court to sue in *formâ pauperis*.

Rule absolute with costs. (*f*)

Attorney for applicants—*Norton*.

Attorney for respondent—*Castle*.

(*f*) Reported by R. E. O'CONNOR, Esq.

EX PARTE T. F. MEYER (*a*).

Insolvency Appeal against Refusal of Certificate—Time runs from making of Order. 25 *Vic., No.* 8, *s* 5.

The time for appealing from an order of the Chief Commissioner refusing a certificate runs from the date of the making of the order.

Darley moved to make absolute a rule obtained during the present term, calling upon the Chief Commissioner in Insolvency and the opposing creditors in the insolvent estate of the applicant to shew cause why a notice of appeal against the order of the Chief Commissioner refusing the applicant's certificate should not be filed *nunc pro tunc*. The order was made on the 31st of July. On the 27th of August the applicant's solicitor applied to the Registrar in Insolvency to draw up the order. On the 3rd of September the Registrar informed the solicitor that the Chief Commissioner would not sanction the drawing up of the order. By the Act 25 Vic., No. 8, s. 5, it is provided that every grant, suspension, or refusal of a certificate by the Chief Commissioner shall take effect from the date thereof, unless reversed or altered by the Supreme Court upon appeal. And that every such appeal shall be within twenty-one days, and shall be subject to any general rules. It is submitted that the time does not begin to run until the order is drawn up. In *Marsh* v. *Patten* (*b*) it was held by this Court that an appeal from a decree of the Primary Judge in the ecclesiastical jurisdiction of the Supreme Court will not be entertained unless the decree has been drawn up. The same thing was held with reference to a decree in equity in *Rattray* v. *Blanchard* (*c*). This is an analogous case, and the same principles apply. By the 5th rule in Insolvency of the 21st of January, 1862, the Registrar is the person appointed "to *draw up* and issue all summonses, rules, *orders*, and certificates." At any rate, if the Court is against the applicant upon the question of time, it will grant the application *ex gratiâ*, as the affidavit discloses a case of hardship, and the Chief Commissioner took a very severe view of the applicant's conduct.

Sir *George Innes*, for the opposing creditors, was not called upon.

PER CURIAM (*d*). The applicant is altogether out of time. He took no steps at all until more than 21 days after the making of the order. It is clear that the time under the statute runs from the date of the making of the order.

Rule discharged with costs.

Attorney for applicant—*Shepherd.*

Attorneys for respondents—*Want, Johnson, and Want.*

(*a*) September 21. (*b*) 7 S. C. R. Eq. 90. (*c*) 6 S. C. R. Eq. 94.
(*d*) Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.

EX PARTE BROWN (a).

Prohibition—Small Debts Court—Administratrix not suing in representative capacity—Costs.

An administratrix sued in her own name in the Small Debts Court at Bega for a debt due to her deceased husband. *Held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.), that a prohibition should be granted.

The applicant was defendant in the suit of *Heffernan* v. *Brown*, tried in the Small Debts Court at Bega. The plaintiff admitted that the amount sued for was due to her as the administratrix of her deceased husband, but the plaint was issued in her own name, and though objection was taken to the form of the plaint, the Justices refused to amend it. The applicant's affidavit stated that no debt was due from him to the plaintiff or her late husband, but that the debt sued upon was due from applicant's brother to the intestate. He also swore that he had a set off against the deceased, of which he was precluded by the form of the plaint from availing himself. A rule *nisi* for a prohibition was obtained during the present term. No affidavits were filed in answer, nor did anyone now appear for the respondents.

R. M. Sly moves to make the rule absolute. Section 33 of the Act establishing Small Debts Courts (10 Vic., No. 10) gives power to executors and administrators to sue in those Courts. Schedule B to the Act provides that "if the plaintiff sues as executor or trustee of an insolvent or other estate, he shall so describe himself in the plaint filed as A. B., executor of C. D., &c." The defendant was injured, because he could not take advantage of his set-off.

Sir JAMES MARTIN, C.J. The applicant was sued in the Small Debts Court at Bega by the plaintiff, professing to sue in her own character as for a debt due to herself personally. The case made out was in respect of a debt due to her deceased husband. Objection was taken that she was not suing as administratrix. No one appears to represent the respondent, and there are no affidavits in answer, so that it must be taken that the applicant's statements are true. I am of opinion that a prohibition ought to go. It is clear law that in the superior Courts an action by an executor or administrator must be brought by him in his representative character. If any difficulty arose whether that rule of law applied to inferior Courts, it is removed by the terms of the schedule to the Small Debts Courts Act.

HARGRAVE, J. It is very much to be regretted that such a trumpery matter as this should come before this Court. As the

(a) September 21.

parties have not thought proper to answer this affidavit, I must take it to be true, but, at the same time, I think the prohibition ought not to go. Nothing appears on the face of this affidavit to shew either an excess of jurisdiction, or anything contrary to natural justice, and it is really matter of appeal only. As there is no appeal from the decisions of these Courts, the application should be refused.

FAUCETT, J. It must be taken to be admitted, as the statements in this affidavit have not been denied, that the defendant had a cross claim against the intestate. By the course pursued there was therefore a clear miscarriage of justice. The only question now is whether the omission to state that the plaintiff sued as administratrix is matter for prohibition. I think it is, as the whole proceeding was improperly begun. The matter is too trivial to award costs.

Rule absolute without costs.

Attorneys for the applicant—*Spain & Sly.*

EX PARTE ROWAN (*a*).

Affiliation order—Corroboration—Payment by reputed father—4 Vic., No. 5, s. 8.

Upon an application for a maintenance order the mother of the illegitimate child proved its paternity. The only other witness called proved that the reputed father had paid moneys under a former order in respect of the same child.

Held (*per* HARGRAVE and FAUCETT, JJ.; *dissentiente*, SIR JAMES MARTIN, C.J.), that the order was not made "upon the oath of the mother only."

Darley, on the 31st August, moved for a rule calling upon certain Justices and one Ada Hardman to shew cause why a writ of prohibition should not issue to restrain further proceedings in the matter of a maintenance order made against the applicant on the information of the said Ada Hardman. It appeared from the affidavits that the only witness called besides the mother who swore to the paternity of the illegitimate child, was a sub-inspector of police who gave evidence that a former order had been made between the same parties, and that the applicant had paid moneys under it. Sir *William Manning*, J., thought that the evidence of the mother was sufficiently corroborated, and that the rule ought not to be granted, but Sir *James Martin*, C.J., and *Faucett*, J., concurred in granting the rule, which now came on for argument.

Darley, in support of the rule. By the Act 4 Vic., No. 5, s. 8, which regulates the granting of orders for the maintenance of

(*a*) September 21.

illegitimate children, it is provided that "no man shall be taken to be the father of any illegitimate child upon the oath of the mother only." The words of the English Act, 7 and 8 Vic., c. 101, s. 3, are somewhat different. The Justices are empowered to make the order "if the evidence of the mother be corroborated in some material particular." There is no authority directly in point. *Reg.* v. *Berry* (*b*), which will be relied on on the other side, turns really on a question of procedure under the English Act. But there is no doubt, independently of that decision, that a voluntary payment would be corroboration of the woman's statement. Not so a payment under compulsory process.

Want shews cause. *Reg.* v. *Berry* is a clear decision that a payment is corroborative evidence. And what difference does it make that the payment was under an order? The order itself would be some evidence of the fact of paternity, and if it was made illegally, or was not supported by the evidence, the defendant might have applied to this Court for a prohibition, or appealed to the Quarter Sessions. But he takes no step to set aside the order, obeys it, and makes payments under it;—how can he be heard now to say that that order was improperly made? His conduct is equivalent to an admission by him of his liability.

Darley, in reply.

Sir JAMES MARTIN, C.J. In this case the applicant was ordered to pay a sum weekly towards the support of an illegitimate child, of which he was alleged to be the father. The eighth section of the Deserted Wives and Children Act provides that no man shall be taken to be the father of any illegitimate child upon the oath of the mother only. The meaning of that is that, in addition to the direct evidence of the mother as to the paternity of the child, some corroborative evidence should be given. The Act is silent as to the particular kind of evidence required in corroboration. It would be different in different cases—sometimes slight, sometimes strong. Of course direct corroborative evidence of the fact of paternity can seldom, if ever, be obtained; but I think that any circumstance which tends to raise a fair presumption that the woman is speaking the truth is sufficient. The rule given in *Hodges* v. *Bennett* (*c*) is that the corroboration required is analogous to the confirmation of the evidence of accomplices in criminal cases. The question here is whether a payment made by the present applicant under a former order against him was sufficient corroboration of the informant's statement. I am of opinion that it was not. We do not know how the first order was obtained, whether legally or not; at any rate, in whatever way it was obtained, each application,

(*b*) Bell C. C. 46; 28 L. J. M. C. 87. (*c*) 5 H. and N. 85.

it seems to me, must stand or fall upon its own merits. I do not see how, on this information, the applicant was bound by an order made at another time by other Justices. The payment of money under compulsion is not an admission at all. It stands on a very different footing from a voluntary payment, and is no more evidence against a man than if the money had been forcibly taken out of his pocket.

HARGRAVE, J. The words of the Act are wisely in very broad terms, and do not point out the kind of evidence which must be given in support of the evidence of the complainant. But as the order cannot be made "upon the oath of the mother only," it seems to follow that the other evidence must be evidence upon oath. Here there is the oath of Sanderson, who proves the payment under the order. I cannot follow the argument of Mr. *Darley* that payments cease to be payments when they are made under an order. This seems to me a stronger case than a mere voluntary payment. As between these parties, and in this particular matter, it is *res judicata*. Stronger corroborative evidence than proof of a former order and payments made under it, it would be difficult to conceive. I believe these orders are generally made only for a year, a fresh application being necessary on the expiration of the term for which they are made. Suppose one or two orders are submitted to; is the woman when she comes for her third or fourth order to bring all her evidence over again? This rule ought to be discharged.

FAUCETT, J. I confess I am not able to follow the arguments which have been used in this case. We are asked to say that a judgment between the same parties in a Court of competent jurisdiction, unappealed against and acted upon, is no evidence of the matter adjudicated upon. To do so would be going contrary to every principle of law we are acquainted with. It is admitted that a voluntary payment would be clearly corroborative evidence; and I think that the payment of money under a former order properly obtained (and we must presume that, in the absence of any evidence to the contrary) is equally so. The order now appealed against was, in my opinion, perfectly legal, and I am further satisfied it was a just one. Under this Act the oath of the defendant would have been admissible, and yet he never tenders himself as a witness, but prefers to rely upon technical objections like the present. I think the Justices were quite right.

Rule discharged with costs.

Attorneys for the applicant—*Cape & Westgarth.*

Attorney for the respondent Hardman—*Robberds.*

MOSCROP *v.* JACOBS. (*a*)

District Court—Supreme Court Issue—New Trial.

Upon a motion on notice to set aside a nonsuit at the trial of a Supreme Court issue in the District Court, the notice being given after the time for filing a memorandum had expired,

Held, that the proper course was to file a memorandum and apply for a rule *nisi* in the first instance, as in the case of a trial in the Supreme Court.

M. H. Stephen moved, pursuant to notice, to set aside a nonsuit in the above cause. The action was commenced in the Supreme Court, but by a Judge's order the issue was sent for trial to the Metropolitan District Court. When the case was called on, the plaintiff was absent, and his counsel, after an application for postponement was refused, elected to be nonsuited. The present motion was made to set aside the nonsuit on grounds appearing upon the affidavit of plaintiff's wife, which shewed that a letter from the plaintiff's attorneys, informing him of the day on which the trial would take place, had, through a mistake in the post office, not been delivered in time. It appeared that the plaintiff lived in Sydney, and that the trial came on in its due course.

Sir *George Innes*, for the defendant, took the preliminary objection that the plaintiff ought to have proceeded by rule *nisi*, and not have put the defendant to the expense of appearing to resist this motion. The proceedings in the case of Supreme Court issues tried in the District Court are the same as in issues tried in the Supreme Court; the cause remains under the control of the Supreme Court; the Supreme Court alone can grant a new trial; and on applications for new trials the rules of the Supreme Court must be, and in practice always have been, followed. He referred to *Davis' County Court Practice* (*b*)

Stephen. The affidavit shews why the plaintiff did not proceed in the usual way by memorandum and rule *nisi*. He only knew of the result of the trial when the time for filing a memorandum had expired. But, even assuming that that would have been the most regular course for him to have pursued, what authority is there for saying that he cannot move upon notice at any time? Whatever the practice may be, it has never yet been decided that the only way a party dissatisfied with the trial of a Supreme Court issue in the District Court can proceed is by rule *nisi*. The Court will not allow its rules to work injustice.

HARGRAVE, J. This application is altogether irregular and out of time. Another reason for refusing it is that it is not made on any distinct and definite grounds. "On the grounds appearing upon the affidavit and pleadings" is altogether too vague.

(*a*) September 22. (*b*) p. 445.

FAUCETT, J. Even upon the plaintiff's own affidavit there is nothing to reasonably account for his not being present at the trial.

Sir W. MANNING, J. I will confine myself entirely to the question of the rule *nisi*. There may be a difficulty as to the time fixed for filing a memorandum in a case in the Supreme Court when the trial is in the District Court. But there is no question that a rule *nisi* ought to have been applied for in the first instance, and the defendant has been brought here quite unnecessarily.

Motion dismissed with costs.

Attorneys for plaintiff—*Want, Johnson, & Want.*
Attorney for defendant—*Hyman.*

THE QUEEN *v.* SWIFT. (*a*)

Criminal Law—Perjury—Materiality.

Upon a trial for horse-stealing, the prosecutor, in answer to questions put in cross-examination, swore that he was a duly qualified medical man, and that his name as such was in the registry of the Medical Board of New South Wales. Perjury was assigned on these statements, and he was convicted.

***Held*, that the conviction was wrong.**

The defendant was tried at the Bathurst Quarter Sessions, before *James S. Dowling*, Esq., Chairman, for perjury committed upon the trial of one Graham for horse-stealing. The evidence on which perjury was assigned was set out in the case as follows:—"In answer to the then Crown Prosecutor, the defendant stated that he was a physician, surgeon, and apothecary; and, when cross-examined by the prisoner, said he was a duly qualified medical man, and that his name as such was on the registry of the Medical Board of New South Wales." These statements were proved to be false. The learned Chairman directed the jury, upon the authority of cases cited, that the statement was one on which perjury could be assigned, and the question reserved for the Court was whether he was right in his direction. The case did not state what the rest of the defendant's evidence at the trial of Graham was, or shew any direct connection between his false statement and the main issues on the trial.

Murray, for the defendant. The question is whether statements which only relate to the social status of the witness can be made the subject of a charge of perjury. It is absurd to say

(*a*) September 21.

that the fact of a man being a legally qualified medical practitioner in this colony can have any bearing at all on his credibility. But no case has ever yet gone the length of holding that perjury can be assigned on statements which, at the most, affect only the credit of the witness, and are unconnected with the other facts in the case. *Reg.* v. *Worley* (*b*), which will be relied on for the Crown, is an infinitely stronger case. Yet there Lord *Denman* thought the evidence was not proved to be material. In *Reg.* v. *Holden* (*c*), *Mellor*, J., and *Lush*, J., thought that perjury could not be assigned on evidence which was material on collateral issues. In *Reg.* v. *Southwood* (*d*), *Watson*, B., held that the fact that evidence was calculated to influence the minds of the magistrates would not be sufficient to make it material. In *Reg.* v. *Gibbons* (*e*), the moral character of the witness was peculiarly in issue. The charge, made falsely against the prosecutrix upon her application for an affiliation order, affected her character for chastity, which was most material in such an investigation. *Reg.* v. *Philpotts* (*f*) has no bearing upon the present case.

C. B. Stephen, for the Crown, in support of the conviction. The general rule as to materiality is laid down at length in *Hawkins' Pleas of the Crown* (*g*). The passage is cited in the last edition of *Roscoe's Criminal Evidence* (*h*). In *Reg.* v. *Overton* (*i*), Lord *Abinger*, C.B., says :—"Every question of cross-examination which goes to the credit of the witness is material." A witness was asked, in an action for goods sold, whether she had been tried at the Old Bailey, and her answer was held material by Lord *Campbell*, C.J., in *Reg.* v. *Lavey* (*j*). *Reg.* v. *Mullany* (*k*) shews that, even if evidence ought to have no effect in an inquiry, still, if it be given with a view of misleading the Judge, perjury may be assigned upon it. He also cited *Reg.* v. *Tyson* (*l*).

Sir JAMES MARTIN, C.J. The question for us, upon the facts of this case, is one of considerable nicety, viz., whether certain evidence was sufficiently material to the charge, in reference to which it was given, to warrant an assignment of perjury upon it. Cases have been cited, two of which were decided by the fifteen Judges of England, and are, therefore, entitled to very great respect. The first was the case of *Reg.* v. *Overton*. There the defendant had, as a witness, proved that he had purchased a dog, and, by way of making his evidence more credible, produced a receipt for the price, and swore that the receipt had been given to him on a day shortly after the sale. Now, it is quite plain to

(*b*) 3 Cox C.C. 535. (*c*) 12 Cox C.C. 166. (*d*) 1 F. & F. 356. (*e*) L. & C. 109; 31 L. J. M. C. 98. (*f*) 2 Den. C.C. 302; 3 C. & K. 135; 21 L. J. M. C. 18. (*g*) Book I. c. 69, s. 8. (*h*) p. 827. (*i*) C. & Mar. 655. (*j*) 3 C. & K. 26. (*k*) L. & C. 593; 34 L. J. M. C. 111. (*l*) L. R. 1 C. C. R. 107.

me that this evidence, though not evidence upon the point at issue, viz., whether the defendant had bought the dog, was connected with it, and was highly calculated to support the defendant's direct statement. And I think the case goes no further than that. In the next case to which I shall refer—*Reg.* v. *Gibbons*—the evidence on which perjury was assigned had been improperly admitted to contradict a woman who denied having had connection with the defendant. The Court held that the evidence, though improperly admitted, was material upon a collateral inquiry before the Justices—the question of the credibility of the woman—which had to be determined by them. In another case, *Reg.* v. *Mullany*, the defendant got the benefit of his false swearing by having the action against him struck out. *Erle*, C.J., says in his judgment:—"Whenever the question arises whether a person may be guilty of perjury, who, with intent to mislead the Court, wilfully swears falsely on a matter, which in the opinion of the Judges, is of doubtful admissibility or immaterial to the inquiry, it will be one well worthy the careful consideration of all the Judges." That shews that the abstract question which we are now called upon to determine, whether perjury can be assigned on evidence which is not material, was not determined in *Mullany's case*, and was thought by the Judges before whom that case was heard to be still an open question. *Reg.* v. *Tyson* is exactly like *Reg.* v. *Overton*. Though the evidence was in itself immaterial, it tended strongly to confirm evidence which was directly material. All the cases which have been cited fail to support the abstract proposition which has been put forward in argument, but shew, on the other hand, that evidence which merely goes to impeach the credit of a witness has never been held sufficiently material to warrant a conviction for perjury. The greatest length to which the Courts have gone is in holding evidence which is connected with the material evidence, itself material.

Here there is nothing to shew that the false statement of the defendant tended to give additional credibility to his evidence on the charge of cattle stealing. It is not stated what part of the case he proved, though it appears that he was the prosecutor. But, however that was, I cannot see that the evidence as to his qualification had any bearing on the rest of the evidence he gave on the question of cattle stealing, nor do I see how it tended to raise any probability of the truth of his principal evidence. It may be that the evidence of a person in the position of a legally qualified medical man is entitled to greater weight. Still, without surmising something, we cannot see that the evidence was in any way material, and as this is a criminal case, and as the

authorities have never gone the length of holding that perjury may be assigned on evidence which is wholly immaterial, I think the conviction should be set aside.

HARGRAVE, J. The Court ought in all cases to be most careful to preserve the truthfulness of witnesses, but, at the same time, to observe the limits fixed by law to prosecutions for perjury. I think that the statement on oath by the defendant that he was legally qualified did affect his credibility as a witness. The jury must be taken to have known that before registration as a medical practitioner, some certificate of his good fame and conversation would be required. It was therefore quite reasonable for them to look upon him as a person of good reputation, and to attach additional weight to his evidence. On the other hand, it is very important in criminal prosecutions that punishments should not extend beyond the strict rules of law. I therefore agree with his Honor the *Chief Justice* that the conviction ought to be set aside, because the evidence did not bear upon the question directly at issue. I think the jury would have given greater credit to the witness because of his false statement, but I cannot sufficiently see that it had any direct bearing upon the credibility of the rest of his evidence. If the witness had represented himself as a clergyman, I would maintain this conviction, because the status of a clergyman would be such a guarantee of the truth of his evidence, but I will not go any further than that, or stretch the law beyond the decided cases.

FAUCETT, J. I should be sorry to be taken to decide that in no case of a similar false statement could a conviction for perjury be sustained. There might be circumstances under which such evidence might have an extremely important bearing on the case. Mr. Justice *Lush's* judgment in *Reg.* v. *Tyson* seems to me to state shortly the principle which runs through all the cases. He says:—"I am quite satisfied that the allegations on which the prisoner was convicted *were calculated to make the jury give a readier credit to the substantial part of his evidence*, and therefore became material." And it is impossible to say that in some cases the statement of a witness that he was legally qualified would not go to support his credit with the jury. I feel some difficulty, but the facts set out in this case seem to me not to connect the statement of the defendant with anything material, or with any part of the substance of the charge then under consideration. With reference to the present case, I entirely adopt the words of Lord *Denman*, C.J., in *Reg.* v. *Worley*:—"Enough has not been shewn on the part of the prosecution to connect the false answer with the issue on which the evidence was given. It might have been material; but we cannot clearly see that it was so." In a case

of doubt it is, at any rate, better to decide in favour of the defendant.

Conviction set aside. Defendant ordered to be discharged.

Attorney for defendant—*T. H. Hellyer.*

THE QUEEN *v.* KNOWLING. (*a*)

Criminal Law—False Pretences—Common Design.

The information charged the defendant with obtaining money by a false pretence, viz., a representation that a worthless document was a good and valid cheque. The pretended cheque was actually presented, not by the defendant, but by R. in his presence. There was evidence of a preconcerted design on the part of R. and the defendant.

The Chairman directed the jury that if it were established by evidence that the scheme was arranged between the defendant and R. from the first, that they were both influenced by a common object, and mutually assisted in carrying it out, and that the one, as well as the other, obtained part of the spoil at the time the cheque was cashed, then the defendant, as well as R., would be guilty under the information.

Held, that the direction was right, and that the defendant was properly convicted.

SPECIAL CASE stated for the opinion of the Court under the 13 Vic., No. 8, by *Alfred M'Farland*, Esq., Chairman of Quarter Sessions for the Southern District. The defendant was tried at the Mudgee Quarter Sessions on an information charging that he "knowingly and designedly did falsely pretend to one E. L. that a certain piece of paper *then presented and delivered by him to her* was a good, valid, and available warrant and order for the payment, and was of the value of £4; by means of which false pretence *the defendant did then unlawfully obtain from her, &c.*" The evidence shewed that the defendant, accompanied by one Ryan, went into the bar of a public house at Gulgong; that Ryan put down a paper in the form of a cheque in payment of drinks ordered by him; that the change was handed to Ryan; that the defendant took no part in the transaction; that Ryan was not seen handing any money to the defendant, but the defendant was seen putting some money in his pocket as he went out with Ryan. The cheque turned out to be worthless, being without date and unsigned. There was evidence that the defendant afterwards said, "You know we got the cheque up for a swindle, and divided the £4 between us."

In summing up, the learned Chairman told the jury "that if a man be drinking in a public-house, and in payment for the drinks lay down upon the counter before the landlady what purports to

(*a*) September 7.

be a cheque, and if he represents that it is a cheque for a specific sum, and demands from the landlady the difference between that sum and the price of the drinks; if she, on the faith of the cheque being a good and valid one, give him the change or difference, and it turns out that the cheque is valueless (as an unsigned cheque, or one that is not drawn by any one, would be), and that the man knew it to be valueless at the time of presenting it, he would be guilty under an indictment charging him with obtaining money by false pretences with intent to defraud. And I added that, if another man be standing by whilst the alleged cheque is being presented, insisted upon, and paid; and if it be clearly established by his statements, admissions, and acts that the scheme was arranged between him and the other man from the first; that they were both influenced by a common object, and mutually assisted in carrying it out; and that the one, as well as the other, obtained part of the spoil at the time the cheque was cashed, then the second man, as well as the first, would be guilty under such an indictment."

Buchanan, for the defendant. The information ought to have charged a conspiracy to defraud. None of the acts alleged in the information were committed by the defendant. He did not make the pretence; he did not obtain the money; nor did he present the cheque. All these things are alleged, and not one of them is proved. Suppose the case of bigamy. Could a man be charged with bigamy because he was present at the second marriage, aiding and assisting the actual bigamist? Could it be said that he "feloniously and unlawfully did marry and take to wife one A B., his former wife being then alive," when perhaps he had never been married at all? Not one of the essential allegations in the information is made out by the evidence.

Foster, for the Crown, was not called upon.

Sir JAMES MARTIN, C.J. I think the conviction should be upheld. The defendant was charged with false pretences. I do not think the evidence of what passed in the public-house would, of itself, have been sufficient to warrant a conviction. But a witness was called who swore to admissions by the defendant that he had "got up the swindle" with the other man. It is clear that if two persons go into a shop together, though one of them says and does nothing, while the other is passing a bad cheque, yet, if anything happens afterwards to shew that he is a party to the transaction, he is just as guilty as the man who actually presented the cheque.

HARGRAVE, J., and FAUCETT, J., concurred.

Conviction sustained.

BELL v. MILLER (a).

Marine Insurance—"Time Policy"—Warranty of Seaworthiness —Parol agreement varying Policy.

To a count upon a policy of insurance on a vessel "at and from the 11th day of May, 1876, to the 10th day of May, 1877, whilst engaged on a pearlshell, beche-de-mer, and trading voyage in and about Torres Straits and adjacent islands," and containing a stipulation that it was issued "under the same conditions as to seaworthiness as a voyage policy," the defendant pleaded that the said ship sailed on the said voyage in an unseaworthy state and condition for the said voyage, and continued in the said state and condition up to, and inclusive of, the time of the loss.

Held, a good plea.

The 2nd count was on a policy of insurance upon cargo "at from Somerset *via* Cooktown to Sydney upon any kind of goods and merchandise whatever loaden or to be loaden in the good ship or vessel called the Tui Lau, beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship or vessel at as aforesaid."

A plea, "that the said pearl and tortoiseshell was not loaded on board the said ship at Somerset, but, on the contrary, prior to her arrival thereat," was held (*per* HARGRAVE, J., and FAUCETT, J.; Sir JAMES MARTIN, C.J., *dissentiente*) a good plea.

PER CURIAM. A parol agreement entered into before the execution of the policy cannot vary or control the terms of the policy.

PER CURIAM. It is immaterial whether the plaintiff knew of the unseaworthiness alleged in the plea to the 1st count or not.

CROSS-DEMURRERS, which were argued in the first term by *Davis* (*Butler*, Q.C., with him) for the plaintiff; *Darley* (*M. H. Stephen*, *Salomons* and *Want* with him) for the defendant.

The pleadings, arguments, and cases cited sufficiently appear in the following judgments.

Sir JAMES MARTIN, C.J. The declaration in this case contains three counts. The first is framed on a policy of insurance on a vessel "at and from the 11th day of May, 1876, to the 10th day of May, 1877, whilst engaged in a pearlshell, beche-de-mer, and for trading voyage in and about Torres Straits and adjacent islands," the policy containing a stipulation that it was "issued under the same conditions as to seaworthiness as a voyage policy."

The second count is framed on a policy of insurance "at from Somerset to Sydney *via* Cooktown upon any kind of goods and merchandise whatsoever loaden or to be loaden in the good ship or vessel called the Tui Lau." . . . . "beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship or vessel at as aforesaid."

(a) September 17.

In the third count it is stated that the vessel in the first count mentioned was lying at an island in Torres Straits called Marbiac, "loaden with a large quantity of pearlshell and ninety-five pounds of tortoiseshell and ready to start on a voyage therefrom to Sydney aforesaid, calling at Somerset, in the second count mentioned, in the course of the said voyage," and that it was proposed to and agreed by the defendants' secretary and agents to insure at an excessive premium the said pearlshell and tortoiseshell for that part of the voyage "which would be between Somerset aforesaid and Sydney aforesaid." The count then went on to allege that the defendants, "through their secretary and agent, then well knowing that all the said pearlshell and tortoiseshell was loaden on board the said vessel at the said island, and would be loaden on board the said vessel before her arrival at Somerset," delivered to the plaintiff the policy in the second count mentioned, and accepted the risk on the said pearlshell and tortoiseshell as if the same were actually put on board at Somerset; that the plaintiff, acting on the faith of this undertaking, paid the premium, and did not otherwise insure the said shell stated in the second count mentioned; and that the premium was received by the defendants on the terms aforesaid—that is, that the goods were to be regarded, for the purposes of the policy, as having been put on board at Somerset instead of before the vessel's arrival at that port.

To the first count the defendants pleaded that "the said ship sailed on the said voyage in the said first count mentioned in an unseaworthy state and condition for the said voyage, and continued in the said state and condition up to, and inclusive of, the time of the loss."

To the second count the defendants pleaded "that the said pearlshell and tortoiseshell was not loaded on board the said ship at Somerset, but, on the contrary, prior to her arrival thereat."

To the third count the defendants pleaded "that the agreement therein alleged as having been made before, or contemporaneously with, the execution of the said policy, was not, nor is the same in writing."

To the first of these pleas the plaintiff replied that he had no knowledge or notice of the alleged unseaworthiness at the time of the effecting of the said policy, or of the sailing of the vessel on the said voyage.

To the second of these pleas he replied, on equitable grounds, that, before the executing and delivery of the policy in the second count mentioned, and when he was applying for the insurance to the defendants' secretary and agent, he informed him that pearl and tortoiseshell were loaded on board the said ship before she

could be at Somerset—in fact, at Marbiac, and that the said agent led him to believe that the fact of the said vessel being so loaded before her arrival at Somerset would not prejudicially affect the policy, and that the plaintiff could take the risk between Marbiac and Somerset, while the defendants by their policy would insure the shell as in the second count mentioned. The replication then went on to allege that the plaintiff, relying on these statements, abstained from effecting any other policy on the said shell.

To the third of these pleas the plaintiff replied that the defendants' secretary and agent informed him that, under the circumstances in the third count mentioned, there was no necessity for any writing embodying the agreement in the said plea mentioned, and that such agreement was good without writing; and the plaintiff, relying on this statement, did not have such agreement put into writing.

The plaintiff has demurred to the three pleas, and the defendants to the three replications above mentioned, and the defendants also gave notice that they would contend on the argument that the third count was bad.

These voluminous pleadings raise substantially but three points for the determination of the Court:—

1. Is there a warranty in the policy set out in the first count that the vessel was seaworthy at the commencement of the voyage and down to the time of the loss?

2. Does the policy in the second count attach to any goods not put on board at Somerset?

3. Can the alleged parol agreement as to the goods having been loaded otherwise than at Somerset affect or control in any way the written policy?

As to the first point, it was contended by the plaintiff that the policy in question being a time policy, it was now settled that in no such policy can there be any warranty of seaworthiness. What, however, has been settled is that in no time policy is any such warranty to be *implied*. It is quite open to the underwriters to stipulate that there shall be such a warranty in a time policy, if they think fit. "I consider," says Lord *Penzance*, in giving judgment in the recent case of *Dudgeon* v. *Pembroke* (*b*), "that the case of *Gibson* v. *Small*, supplemented as it was by the two cases of *Thompson* v. *Hopper* and *Fawcus* v. *Sarsfield* must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, *in the absence of special stipulations* in the contract, infer in the case of a time policy any warranty that the vessel, at any particular time, shall have been

(*b*) L.R. 2 App. Cas. 293.

seaworthy." "The only exception," says his Lordship a little further on, "which has hitherto been established to the underwriter's liability, thus construed, is to be found in the case of *Thompson* v. *Hopper*, where it was alleged that the shipowner himself, knowingly and wilfully, sent the ship to sea in an unseaworthy state, and that she was lost in consequence. It is only necessary to observe upon that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at—there is no case that warrants your Lordships in going any further." In *Thompson* v. *Hopper* (*c*), Mr. Justice *Coleridge*, in delivering the judgment of Lord *Campbell*, in which he stated that he and Mr. Justice *Wightman* concurred, says (p. 189):—"I conceive that it would be much better to lay down the general rule that in time policies there is no implied warranty of seaworthiness. At the bar it was said that this would be very hard upon underwriters. But they are protected wherever there is any fraudulent representation or concealment; they may make inquiries, *and introduce an express warranty*, and they may always insist on a premium adequate to the risk which they run." In the present case, it is expressly stipulated that the policy "is issued under the same conditions as to seaworthiness as a voyage policy." In a voyage policy, the implied warranty is that the ship is seaworthy *when the risk attaches: Arnould on Insurance* (*d*). "The warranty of seaworthiness," as Lord *Penzance* says in *Dudgeon* v. *Pembroke* (p. 296), "applies only to the commencement of the risk." The defendants in their plea to the first count say that the vessel "sailed *on the said voyage* in an unseaworthy state and condition for the said voyage, and continued in the said state and condition up to and inclusive of the time of the loss." So much of this plea as alleges unseaworthiness at the time of the commencement of the voyage, or at any other time antecedent or subsequent to the commencement of the risk, is immaterial, and the plea would be bad, but that the allegation of the continuance of such unseaworthiness until the time of the loss necessarily implies that it existed at the commencement of the period covered by the policy. That being so, I am of opinion that the plea in question is good, and that the demurrer to it should be overruled.

The demurrer to the plea to the second count of the declaration raises a question in reference to which the decisions have not been such as to enable any clear principle to be deduced from them. After referring to a number of them from *Hodgson* v. *Richardson* (*e*) to *Rickman* v. *Carstairs* (*f*), Mr. Phillips, the

(*c*) 6 E. & B. 162. (*d*) Vol. II., p. 588 (citing *Dixon* v. *Sadler*, 5 M. & W. 414). (*e*) 1 W. Bl. 463. (*f*) 5 B. & Ad. 651.

American text writer, in a passage quoted with approval by Chief Justice *Erle*, in *Carr* v. *Montefiore* (*g*), says: "These discrepant decisions evidently do not coincide in support of any general proposition. That to which they seem to be the nearest approximation, and which may be adopted without a departure from any general principle, is that this specification of the *terminus a quo*, unless it appears by the policy to be intended as a warranty of the loading at the designed place, is to be taken as a mere recital, description, or intention, or expectation, being at most an implied representation of the loading, and is to be construed accordingly." These remarks are made under the heading, "Whether specifying the risk to begin on the loading of the goods is mere description or a warranty that the goods shall be loaded at the port named." Chief Justice *Erle* adopted and acted upon Mr. Phillips' view of the law as thus expressed, and as the judgment was concurred in by the other members of the Court, and the decision was in the Exchequer Chamber, affirming a decision of the Court of Queen's Bench, it is entitled to the highest consideration as a correct exposition of the law. We have been referred to all the cases cited by Mr. Phillips, and the subsequent authorities down to *Joyce* v. *Realm Insurance Co.* (*h*). In this last case, Mr. Justice *Blackburn* says (p. 583), "one of the usual printed parts of a policy (and here it has not been struck out) is 'that the insurance shall commence on the freight and goods and merchandise *from the loading of the said goods and merchandise on board the said ship or vessel at as above*,' which would refer to the voyage above mentioned. That means that the underwriters are not responsible for the goods until they are put on board the ship for the voyage that is insured against, unless there is something to the contrary, and so it has been decided. But then in *Bell* v. *Hobson* (*i*), which rather derogates from the rule, Lord *Ellenborough* says it had been held that the words, 'beginning the adventure from the loading on board,' were to be confined to the place from whence the risk commenced. 'But,' he says, '*if there be anything to indicate that a prior loading was contemplated* by the parties, it will release the case from the strict construction.' That I understand to mean that if there be anything on the face of the written instrument (we cannot construe it as importing other matters) *to shew that the loading was to commence at a prior time*, or that the word loading was used in a sense different from the mere putting on board, then it shall prevail." In this and other cases the Court shewed anxiety to escape from the rigid construction put upon the words in question in the early cases, and if words can be found in the policy from which it can be fairly inferred

(*g*) 5 B. & S. 430. (*h*) L. R. 7 Q. B. 580. (*i*) 16 East 243.

that a loading of the goods at a period earlier than the commencement of the risk was in contemplation by the parties, that will be enough to make the policy attach to such goods, notwithstanding other words being used which point to the loading at the port at which the risk commences. In the present case the words are "at from Somerset to Sydney *via* Cooktown upon any kind of goods and merchandise whatsoever, *loaden or to be loaden*, . . . beginning the adventure . . . from the loading thereof aboard . . . . . at as aforesaid." From the latter part of this sentence, standing by itself, it would follow that the insurance was to operate only on goods actually put on board at Somerset, but the earlier words, "*loaden or to be loaden*," clearly point to a loading at an earlier period. In other words, they contemplate either one of two cases, that is to say, goods then actually on board, or goods to be put on board at Somerset. The risk was to attach only at Somerset, and not before, and on the goods on board at the commencement of the voyage from this port, whether put on board there or not. This is the only construction that will give any effect to the word "loaden," and as was said by Lord *Ellenborough* in *Robertson* v. *French* (*j*), whose words are cited by Chief Justice *Erle* in *Carr* v. *Montefiore* (p. 428), "the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance." In *Rickman* v. *Carstairs*, a case in which all the authorities down to that time (1833) were referred to, Lord *Denman*, in delivering the judgment of the Court (p. 663), referring to *Robertson* v. *French* and other cases, says that they "have established that where the policy is upon goods 'from the loading thereof,' either at a particular place or in blank, upon a voyage from one place to another, it does not attach upon goods previously on board; but this, being a strict construction, has been relaxed where there was anything upon the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board." This is exactly in accordance with the view taken in the later case of *Joyce* v. *Realm Insurance Co.*, to which I have already referred. In that case (*Rickman* v. *Carstairs*), the adventure upon the goods began "from the loading thereof aboard the said ship," twenty-four hours after her arrival on the coast of Africa. The goods were valued at £4800 in the policy. At the time of the loss, many months after the vessel had been on the coast of Africa, there was £800 worth of the outward cargo on board, and a homeward cargo valued at £4150. The claim was for the full amount of the insurance, £4800; and the question was whether the policy attached at all upon the outward cargo, and the Court held that it

(*j*) 4 East 130.

did not. Towards the close of the judgment, Lord *Denman* said that if the words had been "on the *homeward* cargo," valued at the same sum, the word "homeward" could not be rejected as inconsistent. "Or suppose," he went on to say, "that in the earlier part of the policy the insurance had been 'upon any kind of goods and merchandise laden on board after twenty-four hours after arrival on the coast of Africa,' *would the valuation by the memorandum* in any way have qualified or varied the subject of insurance? If it would not, neither can it in the present case, for the declaration in the policy that the adventure is to begin from the loading thereof aboard twenty-four hours after such arrival, is in effect the same thing, and confines the insurance to the homeward cargo." It is plain that Lord *Denman* used the word "laden" with reference to a future putting on board, just as though he had said "to be laden;" the only question that he was considering being whether the policy attached to *homeward* cargo, with reference to which it was immaterial where it was laden. In the present case, however, there are the two expressions together, "laden or to be laden," and they both cannot be held to mean one and the same thing. I am of opinion, therefore, that the policy attached to any goods actually on board the vessel at the time of her departure from Somerset, wherever laden, and that the demurrer to the plea to the second count ought to be sustained.

As I have come to this conclusion, it follows that it is unnecessary for me to decide the points raised by the demurrer to the third plea, which are in effect the same as the defendant's objections to the first count. I may say, however, that my opinion on these points is in favour of the defendant.

HARGRAVE, J. Upon these voluminous pleadings there are only two principal questions for our consideration, viz.: the proper construction of the separate policies of assurance set forth in the first and second counts of this declaration, viz., one upon the ship Tui Lau, and the other upon the cargo of such ship.

The operative words of the insurance upon the ship, dated 11th May, 1876, as set forth in the first count of the declaration, are as follows:—"Lost or not lost, at and from the 11th May, 1876, to the 10th May, 1877, whilst engaged in a pearl, beche-de-mer, and for a trading voyage in and about Torres Straits and adjacent islands, upon the, &c., &c., whereof is master at present one Martin, being the adventure upon the said ship as aforesaid, and shall so continue and endure during the abode thereof upon the said ship, &c., shall be arrived at as aforesaid, and there hath moored at and twenty-four hours in good safety, &c. And it shall be lawful for the said ship, &c., in this voyage to proceed and

sail to, and to touch at any ports or places whatsoever for necessary or customary purposes, only without prejudice, &c., &c., for £800, and touching the adventure and perils which the insurers are contented to bear and take upon them in this voyage." At the close of the policy was the following sentence :—"This policy is *issued under the same conditions as to seaworthiness as a voyage policy*, and is not transferable."

It seems to me quite clear that all these operative words of this policy must be construed together, and, if so, they constitute a "voyage policy" upon the ship ; and not a "time policy."

With regard to the equitable replications, I concur with the *Chief Justice* as to the effect of the authorities relating thereto.

Upon the first count of the plaintiff's declaration, therefore, and upon the pleas and demurrers relating to the ship, I think our judgment should be for the defendant.

As to the insurance upon the cargo by a policy set forth in the second count of the declaration, dated the 25th July, 1876, the operative words are as follows :—"Lost or not lost at and from Somerset to Sydney *via* Cooktown, upon any kind of goods and merchandise whatsoever, *loaden or to be loaden* in the good ship, &c., &c., whereof is master, &c., *beginning the adventure* upon the said goods and merchandise from the *loading thereof* aboard the said ship or vessel *at as aforesaid*, and shall so continue and endure until the said goods and merchandise shall be safely discharged and landed at as aforesaid, &c., &c."

It was contended that upon the construction of these operative words this policy would cover goods "loaden" on board the ship before her arrival at Somerset, as well as goods "to be loaden" there; because, otherwise, the words "loaden" and "to be loaden" will be a mere repetition of each other. This, however, scarcely seems to my mind a sufficiently strong argument (if it can be so called) to overbalance the plain and obvious construction of the words "from the loading thereof aboard the said ship or vessel at aforesaid," which clearly point to Somerset alone as the port of loading.

I have had much doubt upon the subject, but, considering the clear words "beginning the adventure," and "the loading at as aforesaid," operative words of the policy taken together, I think that the words "loaden" and "to be loaden" are both limited to Somerset, and consequently our judgment upon the second count of this declaration, and the pleas and demurrers relating thereto, must also be for the defendant.

If the plaintiff had wished to enter into such a general and sweeping policy as contended for by his counsel, he ought to have used clear and unambiguous terms, and not relied merely

upon the words loaden as well as to be loaden, which words are clearly open to the limited construction which all the other words of the whole policy point to as the only proper construction.

With regard to the voluminous pleadings now before the Court, which consist, in the first place, of the plaintiff's declaration, setting forth each policy at full length, even to the names, &c., of the witnesses, all the documents *ipsissimis verbis*, and whether immaterial or material, then of (2ndly) the defendant's fourteen pleas, which are followed (3rdly) by the plaintiff's five replications and three demurrers, then (4thly) by the defendant's two rejoinders and four demurrers, which are concluded (5thly and lastly) by the plaintiff's surrejoinder and joinder in demurrer. Now, it is quite obvious to my mind—first, that all the plaintiff's issues of fact, with all the several points of law he relies upon for a verdict, might have been set forth in the space of a single brief sheet; and second, that the defendant's issues of fact and all the several points of law which he relies upon might also have been set forth in a single half brief sheet, or a sheet and a-half altogether, in place of twenty-five brief sheets now forming this "demurrer book," or rather demurrer volume, containing the elaborated and intricate special pleadings, as they are called, filed by the two parties in the present case.

In my opinion, it is high time that this Court should consider whether we cannot adopt the reformed system of common law pleading recently introduced into the English administration of justice, which, it appears to me, would be highly beneficial to suitors of this Court, and greatly conducive to the real justice in each case in our common law jurisdiction.

FAUCETT, J. In this case there are cross-demurrers. The action is brought to recover the amounts of two policies of insurance, one on a ship, the other on the cargo. The declaration contains three counts.

The first count sets out a policy of insurance on the ship Tui Lau, from the 11th day of May, 1876, to the 10th day of May, 1877, whilst engaged in a pearlshell and beche-de-mer, and for a trading voyage in and about Torres Straits and adjacent islands, with liberty to touch at any ports or places for necessary or customary purposes only. The third plea to this count, which is a plea of unseaworthiness at the commencement of the voyage, is demurred to, mainly on the ground that in a time policy there is no implied warranty of seaworthiness. The demurrer thus assumes that the policy set out in the first count is a time policy. But we have to determine, in the first place, whether the policy is simply a time policy, or whether, like a voyage policy, it is subject to a warranty of seaworthiness, which in a voyage policy is always

implied; and, in the next place, if it be subject to such a warranty, whether still the plea is sufficient.

In a time policy which contains no special stipulation, there is no implied warranty of seaworthiness. On this point, the recent decision of the House of Lords in *Dudgeon* v. *Pembroke* (*k*), is conclusive. The decision in that case is that the law does not infer, in the absence of express stipulation, that a time policy implies a warranty that the ship is seaworthy. In delivering judgment Lord *Penzance* says: —"This question is not new; it has been decided in *Gibson* v. *Small* and numerous other cases. I consider that the decision of your Lordships' House in *Gibson* v. *Small*, supplemented by the cases of *Thompson* v. *Hopper* and *Fawcus* v. *Sarsfield*, has definitely settled that the law does not infer, in the absence of special stipulation, that a time policy implies a warranty that the ship is seaworthy." His Lordship then goes on to say:—"These decisions have been acted upon for many years, and however desirable it may be that an obligation should be imposed on a shipowner with regard to the seaworthiness of his ship, the law is now settled, and any change must be effected by Legislative authority."

In every voyage policy, on the other hand, it is well established law that there is an implied warranty that the ship is seaworthy. Such a warranty is as much a part of a voyage policy as if it were actually expressed in the body of the policy, and can only be excluded from it by terms in writing in the policy very express and definite to that end: *Arnould on Insurance* (*l*), *Gibson* v. *Small* (*m*), *Fawcus* v. *Sarsfield* (*n*).

Now, the policy set out in the first count, although restricting the voyage within certain limits as to locality, is, in my opinion, essentially a time policy, and, if there were no special stipulation, there would be no implied warranty of seaworthiness. But in the policy there is an express stipulation that the policy is issued under the same conditions as to seaworthiness as a voyage policy. This, in my opinion, is precisely such a stipulation as Lord *St. Leonards*, in his judgment in *Gibson* v. *Small*, suggests might be inserted in time policies for the protection of underwriters. "Any supposed difficulty," said his Lordship, "may be obviated by the insertion in time policies of an express warranty of seaworthiness at the commencement of the risk." It was, probably, such a stipulation that Lord *Campbell* also had in contemplation at the end of his judgment in the same case. For, when drawing the distinction between voyage policies and time policies, he says broadly, as to the former, that in all voyage policies a condition of seaworthiness is implied; but when he says, in reference to the

(*k*) 46 L.J. Q.B. Div. 409. (*l*) Vol. I. p. 590. (*m*) 4 H.L.C. 353. (*n*) 6 E. & B. 192.

latter, that such a condition is not implied in any time policies, he carefully adds the words "framed in the usual manner." And, lastly, it is such a special stipulation as Lord *Penzance* speaks of in *Dudgeon* v. *Pembroke.*

What, then, is the effect of this special stipulation? Clearly—if it has any effect at all—if it is not an absolute nullity—it imports into this time policy the condition or warranty of seaworthiness which is inherent in all voyage policies, unless expressly excluded—which is scarcely ever inserted in express words; and, if not, is invariably implied. In a voyage policy the commencement of the risk and the commencement of the voyage are identical; and the warranty is that the ship shall be seaworthy when the risk attaches, that is, when the ship sails: *Arnould on Insurance* (*o*). The warranty of seaworthiness does not extend beyond the commencement of the voyage. Applying the same condition or warranty to a time-policy, it must, in my opinion, by a reasonable construction, mean that the ship shall be seaworthy at the commencement of the period covered by the policy, for at that period, wherever the ship may be, the risk attaches in every time-policy. This construction is entirely in accordance with the suggestions of Lord *St. Leonards*, and gets rid of those disputes and difficulties, which Lord *Campbell* speaks of in *Gibson* v. *Small*, about determining the commencement of the voyage during which the policy attaches. Such, in my opinion, is the meaning of the special stipulation in this policy. It is a warranty of seaworthiness on the day the policy commences, wherever the ship may be, or may have been, on that day. It extends no farther. And surely there is nothing unreasonable in an underwriter requiring, and a shipowner entering into, a special contract to that effect.

In the next place, is the plea sufficient? The plea alleges that the ship sailed on the said voyage in the said first count mentioned in an unseaworthy state and condition. Now, consistently with the terms of the policy, the ship may have sailed on the voyage days or months before the 11th day of May, 1876; or it may not have sailed for days or months after that date. In the former case, the ship, though sailing in an unseaworthy state, may have put into some port or place and got repaired, so as to be seaworthy on the day mentioned; but the plea would assume that the plaintiff had contracted for a state of seaworthiness before that date, in fact, before the policy commenced to operate—unless, indeed, he treated the voyage as commencing from the port where the ship had been repaired, which would be introducing all the difficulties already referred to about determining the

(*o*) p. 589, Vol. I.

commencement of the voyage. In the latter case, as a warranty of seaworthiness in a voyage-policy is satisfied if the ship is seaworthy at the commencement of the voyage, so, in my view of the present case, the special stipulation would be satisfied if the ship were seaworthy on the 11th day of May, 1876; but the plea might seem to require that it should continue in a seaworthy state from that date till the time of sailing. In this case, also, there would be the same difficulty as before in determining what the voyage was. In either case, the plea would seem to assume a larger obligation on the part of the plaintiff than the policy requires, and might, therefore, appear to be not strictly correct; but, as the policy limits the risk to the period mentioned, whilst the ship is engaged in *a voyage* in and about Torres Straits and adjacent islands, I think the plea is substantially correct. It must, however, be construed as alleging that the ship was unseaworthy at the commencement of the risk—that is, on the 11th day of May, 1876.

With respect to the replication to this plea, it is sufficient to say that in a declaration on a voyage-policy, it would be no answer to a plea of unseaworthiness at the commencement of the voyage to say that the owner did not know that the ship was unseaworthy. If the ship were in fact unseaworthy at that time, it would be immaterial whether the owner knew it or not. So in the present case it is equally immaterial. The replication, therefore, is, in my opinion, bad.

For the same reason the fourth replication is bad, as the second and third counts are on a voyage-policy.

The second count of the declaration sets out a policy of insurance effected by the plaintiff, "lost or not lost at and from Somerset to Sydney *via* Cooktown upon any kind of goods and merchandise whatsoever loaden or to be loaden in the good ship Tui Lau, whereof," &c., "beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship or vessel at as aforesaid, and shall so continue," &c. The said goods and merchandise are said to be rated at "on 35 tons of pearlshell, valued at £150 per ton; on 95 lbs. tortoiseshell, valued at £1 per lb.; in the sum of £5345." After the usual averments it is alleged that the said pearlshell and tortoiseshell had all been loaden, and were on board, before and at the time of the said ship leaving Somerset, aforesaid, to be carried on the said voyage, and alleges a total loss by the perils insured against.

The 3rd plea—which is pleaded to this count—says that the said pearl and tortoiseshell were not loaded on board the said ship at Somerset, but, on the contrary, prior to her arrival thereat. This plea is demurred to. It is contended, for the plaintiff, that

the fact of the goods having been loaded on board before the arrival of the ship at Somerset should not prevent him from recovering under the policy. But I am of opinion that the question thus raised is settled by authority.

This question was raised in the early case of *Hodgson* v. *Richardson* (*p*), but that case was decided on another point But in *Robertson* v. *French* (*q*), an insurance on goods and ship—where the words were, as in the present policy, "beginning the adventure upon the said goods and merchandise *from the loading thereof aboard the said ship at* all, or any, or every port, place where and whatsoever on the coast of Brazil,"—the decision was that the policy was not satisfied by the goods having been put on board before the ship arrived at the place from which the adventure was to begin, and that the adventure could only attach on goods and ship after a loading of goods had taken place on the coast of Brazil. In *Spitta* v. *Woodman* (*r*), the words of the policy were "at and from Gottenburgh to her first port of discharge in the Baltic, not higher than Riga," on specific goods valued, &c., "beginning the adventure upon the said goods from the loading thereof on board the said ship" (not saying where). And it was again held that the words meant beginning the risk on goods loaded on board at Gottenburgh, and not on goods put on board before her arrival there. In *Horneyer* v. *Lushington* (*s*), the words were the same, "beginning the adventure upon the goods from the loading thereof aboard the said ship at Gottenburgh." And again the same construction was adopted, Lord *Ellenborough* saying, "When this question was first agitated, I had a difficulty in putting the construction, which is now contended for, on words which I really believe bore a different construction in the commercial understanding of those who used them. However, the Court came to a decision on the point in the case of *Robertson* v. *French*; and the question now comes before us after the decision in *Spitta* v. *Woodman*. It is, therefore, no longer to be doubted what construction is to be put upon these words." In *Langhorn* v. *Hardy* (*t*), where the words again were "at and from Gottenburgh to any port or place of discharge in the Baltic," "beginning the adventure upon the said goods from the loading thereof aboard the said ship," *Spitta* v. *Woodman* was followed. In *Mellish* v. *Allnutt* (*u*), the voyage was again from Gottenburgh to any port or ports of discharge in the Baltic, and the words were "beginning the adventure upon the said goods from the loading thereof aboard the said ship." This case is remarkable, because Lord *Ellenborough*, who in *Horneyer* v. *Lushington* seemed to question the correctness

(*p*) 1 W. Bl. 463. (*q*) 4 East 130. (*r*) 2 Taunt. 416. (*s*) 15 East 46.
(*t*) 4 Taunt. 629. (*u*) 2 M. & S. 106.

of his former decision in *Robertson* v. *French*, really uses the same kind of reasoning as he did in the earlier case. He says, "If, by the terms of the policy, it had been simply on a voyage at and from Gottenburgh, the adventure would have commenced from the loading at Gottenburgh; and the subsequent words, 'beginning the adventure from the loading thereof aboard the said ship,' seem to have been introduced for the purpose of clearing up any doubt as to the risk, or rather, perhaps, for the making a more specific designation of its commencement. To construe the subsequent words 'from the loading, &c.,' to mean only the same thing as *being loaded* would be giving them no effect, for that would be beginning the adventure at Gottenburgh without regard to the loading. It seems, therefore, to be the probable construction that the loading meant must be subsequent to the ship's arrival at the port, and during that time she is at the port whence the voyage is to commence, and then the words 'and to continue, &c.,' will connect." *Spitta* v. *Woodman* is then followed. At a much later period, in *Rickman* v. *Carstairs* (*v*), these decisions were again followed.

There is no doubt, however, that the construction thus adopted was considered a strict one; and the Courts have, on several occasions, shewn an anxiety to get out of it. Thus, in *Nonman* v. *Kettlewell* (*w*), the unloading of part of the cargo at the place mentioned, for the purpose of repairing the ship, so that the whole cargo might be seen and examined, and reloading again was considered a loading at the place within the policy. This decision is followed in *Carr* v. *Montefiore* (*x*), on the ground that there was a constructive loading. In this last case, although the correctness of the early decisions seems to be questioned, their authority is not questioned. "Without at all intending," says *Erle*, C.J., "to run counter to a series of decisions, I dispose of this case because I think the case of *Nonman* v. *Kettlewell* is a decision in favour of the plaintiff." *Bramwell*, B., also says, p. 432, "I have no desire to overrule cases already decided, but I think the construction of this clause is as stated by Lord Chief Justice *Erle*. And in this I think we do not dissent from, or overrule, *Robertson* v. *French*." These cases, I may observe, were decided upon the evidence. In the present case it is admitted by the demurrer that the loading of the goods on board was before the arrival of the ship at Somerset.

If, also, there is anything in the policy which shews that a prior loading was intended or contemplated, the case will be taken out of the strict construction. Thus, in *Bell* v. *Hobson* (*y*), where it was stated at the foot of the policy

(*v*) 5 B. & Ad. 651. (*w*) 16 East 176. (*x*) 5 B. & S. 438. (*y*) 16 East 240.

that the policy was in contemplation of former policies, it was held that the former decisions did not apply. And in *Gladstone* v. *Clay* (z) where the words were "from the loading thereof on board the said ship wheresoever," the word *wheresoever* was considered to have been inserted for the purpose of meeting the former decisions, and was construed in its most general sense. So also in *Joyce* v. *The Realm Insurance Company* (a), where it was stated in the policy that the insurance was a re-insurance, subject to all clauses and conditions of the original policy, the case was held to be taken out of the strict construction.

Is there anything, then, in the present policy, for we cannot look outside of it, to shew that a prior loading was contemplated? The only words that it is suggested could have this effect are the words "upon any kind of goods and merchandise whatsoever *loaden or to be loaden* upon the good ship called Tui Lau, &c.," in the commencement of the policy. It is contended that these words "loaden or to be loaden," which it is said are not found in any other case, shew that it was within the contemplation or the knowledge of the underwriters that the goods had been, or would be, loaded on board before the ship's arrival at Somerset, and must control the immediately subsequent words "beginning the adventure from the loading thereof at Somerset." In a similar way, in *Rickman* v. *Carstairs*, it occurred at first to a part of the Court that the words "on the cargo valued at £4800" shewed the intention of the parties, because such a sum could only be made up by including both the homeward and outward cargo; but the Court held otherwise, and decided that they must be restricted by the subsequent words, "beginning from the loading thereof." So I think we must decide here. We must, if possible, give a meaning to all the words; and it appears to me the more reasonable construction is to treat the words "loaden or to be loaden" as descriptive of goods that were either actually on board at the commencement of the policy or at the time of issuing it, or that would be put on board afterwards, but in either case—according to the subsequent words defining and restricting the commencement of the risk—put on board at Somerset, and not before. By this mode of construction every word will have a meaning, while, by the construction contended for, the words "at Somerset" will have none.

I am of opinion that the sixth plea is a good plea.

I am also of opinion that the third replication is no answer to the sixth plea.

In the first place, the second count sets out a cause of action at law founded upon the policy, while the replication shews that

(z) 1 M. & S. 410. (a) L.R. 7 Q.B. 580.

the plaintiff's claim, if he has any, is merely an equitable one, and is, moreover, founded, not on the policy as set out in the declaration, but on the policy varied in a material part by some verbal statements or representations alleged to have been made by the company's agent before the policy was issued. The replication is thus a departure from the declaration.

But the replication says that from the circumstances stated the defendant ought to be estopped from setting up the defence pleaded. What the plaintiff says in substance is that when he was applying for the insurance he informed the company's agent that the pearlshell and tortoiseshell were in fact loaded on board the ship at the island of Marbiac before the ship sailed for Somerset, and that he was induced by the agent's statements to believe that that fact would not invalidate the policy, and that he could himself undertake the risk from Marbiac to Somerset. He says also that under such belief he paid the premium and obtained the policy, and undertook himself the risk from Marbiac to Somerset, and that he obtained no other policy.

Now, while I admit that a plaintiff might in an equitable replication set out circumstances that should estop a defendant from setting up a particular defence, and that the conduct, or statements and representations of a defendant on which the plaintiff acted, might amount to such circumstances, I am of opinion that the circumstances set out in this replication are not sufficient for the purpose. In the first place, *Spitta* v. *Woodman*, and still more *Langhorne* v. *Hardy*, where there was a special finding of the fact, shew that the knowledge of the underwriters can have no effect, unless such knowledge appears from the policy itself. In the next place, after an examination of *Pickard* v. *Sears* (*b*) and a great many of the cases which are decided upon the same principle, I think I may say that in all the cases in which representations or statements have been held to amount to an estoppel, the representations or statements have been in reference to some existing fact, or some existing state of facts, and that in no case has an estoppel been allowed when the statement relied on as an estoppel had a reference to a future event that might or might not happen, or when the statement merely expressed an opinion, especially an opinion as to a question of law, or still less where the person seeking to take an advantage of the estoppel had the same means of forming an opinion as the person on whose statement he relied, and had besides the full means, if he acted with common prudence, of protecting himself.

(*b*) 6 A. & E. 469.

But on all these points it appears to me that this replication fails. The principal statement relied on refers to the legal effect of a written instrument not yet drawn up, and of which the plaintiff could form an opinion as well as the agent. Not being yet drawn up, surely it was the plaintiff's duty to see that it should meet and provide for the actual state of things. But, besides this, when the policy was delivered to him, he had then the means of seeing whether it carried out his intentions, and, if it did not, of calling the attention of the company to it, when it might have been at once corrected. The circumstance that the plaintiff, acting upon his own belief, undertook himself the risk from Marbiac to Somerset, and the averment that the defendant is setting up this defence in fraud of the plaintiff's rights under the policy, ought, in my opinion, to have no weight. I am of opinion that no estoppel is established, and that the replication is bad on the strong ground that it seeks by verbal statements, made before the policy was issued, to vary the effect of the policy.

Most of these observations are applicable to the third count and the fifth replication, which I am now going to consider.

The third count sets out an agreement that a policy of insurance should be issued by the company on certain terms; and alleges that the policy set out in the second count was issued in pursuance of the agreement.

The ninth plea says that the agreement set out in the third count was not in writing. This plea is demurred to. There is also a replication to it on equitable grounds, in substance almost the same as the replication to the sixth plea. Most of the observations I have made in reference to that replication will be equally applicable to this portion of the pleadings.

If there were any statement in the policy from which it could be gathered that it was the intention of the parties that the goods should be loaded on board before the ship's arrival at Somerset, such statement would, as already observed, without being set out in the form of a special agreement, form part of the contract, and control the words of the policy which describe the adventure as beginning "from the loading thereof at Somerset," and so would take the case out of what has been called the strict construction of the earlier cases. But the circumstances stated shew clearly that the agreement set out in the third count was not inserted in the policy, and was anterior to it, and that it was, moreover, a mere verbal agreement. If, indeed, there could be any doubt on the latter point, the demurrer to the plea admits it to be so.

Now, although it is said in some of the cases that policies of this kind are to be construed largely for the benefit of trade and of the insured, all the authorities shew that in construing them

we must look only at the policies themselves; and it is certainly contrary to principle to allow a mere verbal conversation, even though said to amount to an agreement, to control and alter the effect of a written instrument of this kind. I have already referred to *Spitta* v. *Woodman*, and *Langhorne* v. *Hardy*, where the knowledge of the underwriters was held to be immaterial, as such knowledge did not appear from the policy. And in *Halhead* v. *Young* (*c*), where a correspondence that had been shewn to the underwriters was set out in the declaration for the purpose of shewing the intention of the parties, it was held that the construction of the policy could not be varied by it, as the policy did not refer to it. It is said, indeed, by Lord *Campbell*, that "the declaration having alleged that the underwriters had notice of the correspondence, and that the action of the intended risk was explained to them, does not allege that the correspondence formed part of the contract between the parties." But it is difficult to see how a declaration, even with such an averment, could be supported unless, at all events, it appeared in writing—and probably on the policy itself—that the correspondence did so form part of the contract. Possibly Lord *Campbell's* observation was in the pleader's view when he drew this third count. At all events we have an agreement set out—a verbal agreement—by which the company, knowing that the plaintiff's goods were laden on board before the ship's arrival at Somerset, agreed to insure them as if they were on board at Somerset. It is then alleged that, in pursuance of that agreement, the company delivered to the plaintiff the policy mentioned, and that on its delivery they became insurers of the goods according to the terms of the verbal agreement and of the policy. But the policy is, on this point, in contradiction to the verbal agreement. This is simply saying, not only that the verbal agreement shall form part of the contract of insurance, but shall have greater efficacy than the policy which is under seal.

But what is the consideration alleged for this verbal agreement? Passing over the conversations between the plaintiff and the company's agent, which are merely introductory, the consideration stated is—(1) that the plaintiff should himself undertake the risk on his own goods for so much of the voyage as was between Marbiac and Somerset, and (2) that he should pay the premium of these goods per centum then agreed upon, for so much of the voyage as was between Somerset and Sydney. Now the first part of this consideration can only mean that the plaintiff, thinking the premium demanded for the first part of the voyage too high, would not insure

(*c*) 6 E. & B. 312.

for that part either with the defendant's company or with any other; and it is difficult to understand how such a circumstance could be in any degree a consideration for the company's undertaking the risk of the other part of the voyage. And, as to the second part of the alleged consideration, according to the policy, the premium mentioned was the consideration for insuring according to the terms of that, and nothing else. And there is nothing either in the policy or even in the verbal agreement to shew that the premium mentioned is unusual for the risk, if such a circumstance could have any effect.

But does the fifth replication support or give validity to the third count? It says that the plaintiff, relying on the statements made by the company's agent, believed that there was no necessity for any writing embodying the agreement, and therefore refrained from putting it, or causing it to be put in writing. Now, in this statement, as it appears to me, lies much, if not the whole of the weakness of the plaintiff's case in this part of the pleadings. And nearly all that I have said in reference to the third replication is applicable here. Surely it was as much the plaintiff's business as the agent's or the company's to know that, as a matter of law, the policy itself should be in writing, and that anything that qualified it should also be in writing. Moreover—as I have pointed out in my observations on the third replication—when the policy was delivered to the plaintiff, he had then an opportunity of seeing it, and of calling the company's attention at the time to the fact that it was not in accordance with the verbal agreement. If he had done so, the company could have then rectified it. He did not do so. And so far from the defendant being estopped from setting up the defence that the agreement was not in writing, it appears to me that the plaintiff ought to be estopped now, after such a lapse of time, from setting up an agreement contrary to the policy. I could understand the plaintiff setting up a verbal agreement with the company that they would issue a policy on certain terms, and alleging that they refused to issue a policy on the terms agreed upon, but issued one on different terms, and seeking damages for the breach of their agreement; but that is not the present case, for here the policy is said to be issued in pursuance of the agreement, without alleging either fraud or mistake.

As I consider, therefore, that the fact of not insuring for part of the voyage was no consideration for the company's agreement to insure for the other part, and as I also consider that the premium was paid for an insurance in terms of the policy, I am of opinion that there is no consideration shewn for the agreement set out, and consequently that there is no part performance. I

can see no ground, therefore, on which a Court of equity would now give the plaintiff relief.

Taking the third count and the fifth replication together, the strong ground of objection—as before to the third replication—is, that it is an attempt not only to set up a verbal agreement against a policy subsequently drawn up and issued, but to give greater efficacy to the verbal agreement than to the instrument under seal. Here is an instrument, as appears by the policy itself, signed by certain persons appointed by the company for that purpose, and sealed with the seal of the company, and then delivered to the plaintiff, who receives it without any complaint or observation. This instrument, so signed, sealed, and delivered, is, if the plaintiff's contention is to prevail, to be set aside by a prior verbal agreement. If such a course were to be allowed, the object and advantage of written policies would be altogether destroyed, and no insurance company would be safe.

Upon the third count, the ninth plea and fifth replication taken together, I am of opinion that judgment must be for defendant.

Judgment for defendant.

Attorney for plaintiff—*Bull.*
Attorneys for defendant—*Slade & Smith.*

RAND *v.* WILLIAMS (*a*).

Trespass—Pleading—Liability of person impounding in improper pound—Impounding Act, 29 Vic., No. 2.

A person lawfully impounding under the Act 29 Vic., No. 2, is not liable for the improper state of the pound (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.).

A declaration alleged that the defendant seized and took certain sheep of the plaintiff, and impounded them in a yard unfit and improper for such purpose.

Held (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.), that a plea justifying the seizing and taking under the Impounding Act was a sufficient answer to the whole declaration, as the allegation that the sheep were impounded in an improper pound was mere matter of aggravation.

Wilder v. *Speer* and *Bignell* v. *Clark* distinguished.

DECLARATION. That before, and at the time, &c., the plaintiff was possessed of a flock of stud breeding ewes and fat sheep of great value, whereupon the defendant seized and took the said ewes and sheep of the plaintiff and impounded them in a yard

(*a*) September 20.

unfit and improper for such a purpose, and kept them there impounded without food for a long time, &c. The declaration then alleged other impoundings of the same sheep in other yards similarly unfit and improper, and concluded with averment of special damage. There were also counts of trespass and trover, and a money count.

PLEAS. 1. Not guilty. 2. As to the first and second counts respectively, that before and at the time, &c., the defendant was in possession of certain lands whereof the defendant was then the occupant within the meaning of the Impounding Act of 1865; and because the said sheep were then trespassing upon the said lands, and doing damage thereto, the defendant seized and took the said sheep for the purpose of impounding them, and drove them to the public pound nearest to the said lands where the same were trespassing and doing damage as aforesaid, and impounded them in the said pound as a distress for the said damage, as the defendant lawfully might for the causes aforesaid, which are the alleged grievances herein pleaded to.

DEMURRER on the grounds:—1. That, as the defendant admits the several grounds to have been unfit and improper for the purpose, it is immaterial whether the defendant was or was not justified in seizing the said sheep. 2. That the plea confesses, but does not avoid, the cause of action stated in the first count. 3. That if the defendant was justified in impounding the said sheep, he was, in law, bound to impound them in a fit and proper pound; and, as the said plea admits that this was not done, the defendant, in seizing and taking the said sheep, became liable in this action.

Darley, in support of the demurrer. The several allegations of impounding in unfit and improper pounds are material averments, and not matter of aggravation. *Wilder* v. *Speer* (*b*) shews that it is the duty of persons impounding animals to impound them in a proper pound. This case is followed by *Bignell* v. *Clark* (*c*). Independently of these authorities, on principle a person distraining the cattle of another for his own benefit is bound to take proper care of them. [FAUCETT, J.: Could the sheep in this case have been put in any pound but the public pound? Is not the poundkeeper compelled by statute to keep the pound in order?] In *Wilder* v. *Speer*, the Judge, at the trial, so directed the jury, but his direction was overruled. Under our Impounding Act a person is not bound to impound in the public pound. He may impound on his own land for a certain time, and send notice to the owner, and recover damages and driving charges. Under section 24 he has an alternative remedy

(*b*) 8 A. & E. 547. (*c*) 5 H. & N. 485.

altogether. [MARTIN, C.J., referred to *Vaspor* v. *Edwards* (*d*).] That case was referred to in the defendant's argument in *Wilder* v. *Speer*. It is quite clear, on the authority of these two cases, that the impounding in an improper pound is a substantial cause of action, and not matter of aggravation.

C. B. Stephen, in support of the plea. Whether the defendant is liable for the state of the pound or not the plea answers the gist of the action; the plaintiff should have replied the unfitness of the pound, which is matter of aggravation. This was done in *Wilder* v. *Speer*, where the pleadings were similar to the pleadings in this case. The declaration is in trespass, and the gist of the action is the seizing and taking the sheep; everything else is matter of aggravation, which should have been replied or new assigned. *New* v. *McMaster* (*e*), *Hutchinson* v. *Burnell* (*f*), *Taylor* v. *Cole* (*g*), *Montpowell* v. *Smith* (*h*). The proper form of action for the injury complained of is an action on the case, as the injury is consequential and not direct. *Bignell* v. *Black* was an action in the case; in *Gates* v. *Bayley* (*i*) the facts were like the present. There it was held that case, not trespass, was the proper form of action. *Brunett* v. *Alcott* (*j*), *Griffiths* v. *Drennett* (*k*), are to the same effect. The defendant, having a difficulty in determining whether an injury is a substantial cause of action, or matter of aggravation only, is entitled to compel the plaintiff to reply or new assign. Matter of aggravation, according to the rule in *Taylor* v. *Cole* (*l*), and *Dye* v. *Leatherdale* (*m*), may be replied, and the *Six Carpenters' Case* (*n*) shews that such a replication would not be a departure.

Darley, in reply. It is true that in *Wilder* v. *Speer* the unfitness of the pound was replied, but such replication was unnecessary. The distinction between the form of action in trespass and case was almost exploded in *Scott* v. *Shepherd* (*o*). The defendant by his pleading has treated the impounding in an unfit yard as the gist of the action, but has not answered it. The cases cited on the other side were cases in which matters of aggravation only have been stated in the declaration. [FAUCETT, J.: If the defendant is not responsible for what took place after the sheep were regularly impounded, the plea is good.] The wrongful act is the putting of them into the unfit pound. He is responsible for everything that happens to them afterwards. In *Gates* v. *Bayley* the animals died after being put into the pound. The section of the Act which gives a remedy against the poundkeeper does not take

(*d*) 12 Mod. 659. (*e*) 2 S. C. R. 323. (*f*) 7 S. C. R. 64. (*g*) 1 Sm. L. C. 123. (*h*) 2 Camp. 173. (*i*) 2 Wils., 313. (*j*) 2 T. R. 166. (*k*) 7 M. & G. 316. (*l*) 7 M. & G. 1002. (*m*) 3 Wils., 20. (*n*) 1 Sm. L. C. 123. (*o*) 1 Sm. L. C. 484.

away the plaintiff's common law right against the distrainor; it gives him an additional remedy. The poundkeeper is generally a man of no substance, and if the remedy against the distrainor is gone, a person whose sheep are injured in this way is practically left without redress.

C. A. V.

MARTIN, C.J. (*p*). In this case the plaintiff complains of the seizing and taking certain ewes and sheep and impounding them in a yard unfit and improper for that purpose, and the declaration then goes on to allege impounding in two other places similarly unfit and improper. The defendant has pleaded that, being an occupant of certain lands within the meaning of the "Impounding Act of 1865," he impounded the said sheep, then doing damage on his land, in the nearest public pound, in accordance with the provisions of that Act. That plea has been demurred to on the ground that the impounding in an unfit and improper place is a substantial part of the declaration and has not been answered by the plea. In deciding this demurrer two questions arise—first, whether the impounding in an unfit yard is a good ground of action at all. Secondly, if it is so, is it, in this form of declaration, anything more than aggravation of damages? As to the first question, two cases have been cited by the plaintiff's counsel for the purpose of shewing that a person who impounds animals in a public pound in this colony unfit for the purpose is liable to the owner of such animals for any injury they may sustain thereby. The first of these cases is *Wilder* v. *Speer*. The declaration in that case, which was similar to the one now before us, complained of the seizing and taking of sheep and impounding them in an unfit muddy yard. At the trial the Lord Chief Baron told the jury that if the pound was ordinarily fit and proper for impounding the defendant would not be liable because of its state on the particular occasion complained of. This direction was overruled. On the argument a passage from "*Doctor and Student*" was quoted, as also *Vaspor* v. *Edwards*; and in the judgment *Littledale*, J., says:—"The distrainor must at his peril find a proper pound; Generally the manor pound would be a proper place, but if that is not in a fit state he must find another. The pound must be in a proper condition at the time of impounding." I lay stress upon these words of *Littledale*, J., because they were adopted by the Judges in the succeeding case, and shew the grounds upon which both decisions were founded. Following that case, which was decided in 1838, is *Bignell* v. *Clark*. There the declaration was not, as in the preceding case, in trespass, but was in case, and especially

(*p*) September 21.

complained of the putting in an unfit pound as the cause of action. *Wilder* v. *Speer* was cited on the argument, as well as "*Bacon's Abridgment*," "*Doctor and Student*," and all the old authorities. In the judgment *Pollock*, C.B., says—"Without referring to the ancient authorities, I think the law is correctly laid down in *Wilder* v. *Speer* by *Littledale*, J., who says, &c." (quoting the passage above referred to). *Martin*, B., says:—"The law is correctly laid down in *Wilder* v. *Speer*, viz., that the distrainor must at his peril provide a proper pound. That is not only law but good sense. If a man thinks fit to take the cattle of another, in order to obtain payment of damage, it is his duty to take care of them." The reasoning in both these cases is founded on the assumption that the person impounding *has an* option to take the distress to any pound he thinks fit. *Having* a choice of pounds, he must take at his peril to a proper pound. Both these cases rest on the authority of *Vaspor* v. *Edwards*, the only previous reported case on the point. The case is reported in *Lord Raymond*, *Salkeld*, and 12 *Modern*, but it is only in the last mentioned report that the point we are considering is mentioned. The case seems to have been for a long time under consideration. Amongst other arguments, a passage from *Doctor and Student*, cited afterwards in *Wilder* v. *Speer*, was quoted:—"For the distress must be in a convenient pound, and if it be not such, and a distress is put into it and abused, though it be what is called a common pound, the distrainor shall answer for it." The report at the conclusion of the argument says, "to all which *Holt*, Chief Justice, strongly inclined." But a strong inclination does not make law, and there is nothing to shew to which of the many arguments used the *Chief Justice* inclined. In the judgment, at p. 664, Lord *Holt* says:—"And surely it is the default of the defendant that he put it into an ill pound . . . and it being a common pound makes not to the case; for, be the pound common or not, it is the pound of him that uses it for that time; and the law does not require a man to put the distress in a common pound, but only that it be put in a pound overt or be fed at the peril of the distrainor and taken care of by him . . . for the distress is for his benefit, *and the law appoints none else to take care of it;* and though some pounds have haywards, who are officers in leets, yet the law takes not any notice of them." That is the case upon which the two authorities cited for the plaintiff proceed. It is founded on two principles:—First, that the distrainor may put the distress into any pound he chooses; secondly, that when he has put it into a pound, that pound becomes his for the time, and he alone is responsible for the care of it. The same law is laid down in all the old authorities. These

decisions can have no application to the case before us, unless a similar state of things exists in this colony with regard to the forming of pounds and their care and management. But in this colony the state of things is entirely different from that which existed in England when these cases were decided. In the first place, a person distraining sheep or cattle cannot impound in any pound he chooses. He must impound in a particular pound and in a particular manner pointed out by the statute. In the next place, there is a person appointed who is by law entrusted with the care of the pound, and is liable to the owner of impounded animals for injury caused by his negligence. There was no such liability imposed on the haywards spoken of in Lord *Holt's* judgment in *Vaspor* v. *Edwards*. The reasoning of these cases not applying, the cases do not apply. Our Impounding Act (29 Vic., No. 3) provides by section 2 for the appointment of a *poundkeeper* of whom the law must take notice. By section 8 he is required to keep the pound in repair at his own cost, thereby introducing a very wide distinction between the law here and in England. The 22nd section (upon which the plea is founded) enacts that "any occupant upon whose lands any animals shall trespass may drive or send the same," not to any pound in the neighbourhood, but "to the *public* pound nearest by a practicable road or highway to the land where the same were trespassing." Here, therefore, a person impounding is bound to take the stock to a particular pound, and, unless he foregoes his right to impound altogether, has a right, when he impounds, to deliver them to the proper officer, at the proper pound, whether it is in an improper condition or not. It cannot be supposed that the right to impound given by the statute to a person aggrieved is to be taken away because of wrong-doing and neglect of duty on the part of the person appointed under the decision of the Legislature to take care of the pound. I am, therefore, of opinion that the part of the declaration which alleges that the defendant impounded the plaintiff's sheep in an unfit and improper pound, discloses no cause of action at all, and is an immaterial averment, and that the demurrer ought on that ground to be overruled. But I am further of opinion that, if it did disclose any ground of action, it is, in this declaration, mere matter of aggravation. The declaration charges trespass, seizing and taking the plaintiff's sheep. That is what the plaintiff mainly complains of. I do not think it necessary to refer to more than the case of *Gates* v. *Bayley*. On the authority of that case I am prepared to hold, and do hold, that the plea is a sufficient answer to the declaration, and that the demurrer ought to be overruled.

HARGRAVE, J. ' In this case the plaintiff's complaint is of the defendant's conduct—that he seized and took the plaintiff's sheep and impounded them in an unfit yard. It is immaterial whose the pound was. The law is clear that if in the course of doing an act lawful in itself a person damages the property of another he is liable. The gist of the action is the impounding in an unfit yard. The defendant cannot say that the gist of the complaint is impounding only, and assume to answer that, passing by the complaint of the unfitness of the yard. It is immaterial where the sheep were impounded, or under whose care the pound was. The person whose cattle are distrained has at common law a right of action against the distrainor for injury done to his cattle, and the Impounding Act does not in any way take away that right. It is ridiculous to say that the poundkeeper can be made liable to a person whose sheep are injured in the pound. He is liable as a public officer for a breach of duty, but not to the owner of animals injured by his neglect. With regard to the cases cited for the plaintiff, they were decided by Judges of great authority, and the decisions are put on the ground that it is against common sense that a man who impounds another's property for his own benefit should not be liable for injury caused by him to such property, or that he should be allowed, not only to impound, but to injure or destroy the distress. If a man wishes to impound, and cannot find a proper place, he must leave it alone and bring his action for the trespass. The word "impound" is a common law word, having certain incidents attached to it, and you cannot adopt the word without adopting its full meaning at common law, and all the incidents that attach to it. Other common law words, such as "conditional purchaser," imported into the statute law of this colony, have been held to retain all their old common law meaning. That is the way in which we have brought the common law with us. And the word "impound" used in our Act carries with it all the rights and duties incidental to impounding in England. I think the impounding in an unfit yard is a necessary and material averment, and not matter of aggravation only. I would adopt the words of Baron *Martin* in *Bignell* v. *Clark*, that "it is not only law but good sense" that the defendant should be responsible under the circumstances. I think the plea is bad, and the demurrer must be sustained.

FAUCETT, J. I am sorry that this case has been argued on the old technical question whether the impounding complained of was a substantive trespass or mere matter of aggravation. No doubt it is a serious matter of complaint, and might have been made a substantive cause of action. In *Bignell* v. *Clark* the

declaration omitted the technical word "seized," and the difficulty was avoided. Here this has not been done. The gist of the declaration is the seizing and taking of the sheep, and it seems to me that all that follows is merely matter of aggravation. In looking at this question we may separate the facts into two branches very distinctly separated: first, what took place before the actual impounding; second, what took place after the impounding. Under our Act the rights and duties of a person impounding are greatly and seriously modified. Although the word "impound" is used in the Act, it is so qualified by words and passages before, after, and around it, that it has to a great extent lost its common law meaning. In England the distrainor might choose his pound. Here there is no such power. At common law he was bound to see that it was a proper place for keeping animals impounded, because it was for the time being his pound. Here the pound is the public pound, the pound of the law, with peculiar incidents attached to it by statute, and under the care of an officer specially directed by statute to perform certain duties in regard to it. Here, then, the common law is so seriously modified, that the cases cited for the plaintiff cannot apply. It is immaterial in the view I wish to take whether the impounding was a substantial trespass or an aggravation. I wish to decide above technical grounds, and shall therefore assume that the impounding was a substantial trespass. Is the plea an answer to the declaration? The defendant has no right of impounding except under the Act. He may impound for a limited period and under certain restrictions on his own land, but he has no power of choosing a pound as in England. But when the statute gives a right which is exercised in accordance with the statute, which the defendant has exercised, following the very words of the Act, how can he be held liable? To protect himself against an action of trespass he is bound to follow the exact directions of the statute, and yet, it is said, if he does so he is to be held liable. By the 4th section of the Act a poundkeeper is appointed with special duties. He is a legal officer appointed under the statute for a particular purpose, of whom we are bound to take notice. By section 8 certain duties in regard to the keeping of the pound are imposed upon him, with which no one can interfere. Suppose the pound to have been full of dangerous spikes, as was suggested in *Vaspor* v. *Edwards*, can it be supposed that the distrainor, who is *obliged* to impound the distress in such a place, would be liable for such unfitness in the pound? Surely, it is the poundkeeper only who, under those circumstances, would be liable. By section 14 the poundkeeper is

to send notice to the owner of impounded animals. In this particular again the old common law is entirely changed. The most important section of the Act, and that on which the defence rests, is the 22nd. Under this section the distrainor is to deliver the distress to the poundkeeper. By delivery to the poundkeeper he has performed his duty, and all liability in regard to the impounded animals, as far as he is concerned, ceases. The poundkeeper having charge of them then becomes liable. *Wilder* v. *Speer* and *Bignell* v. *Clark* can have no application to such an altered state of the law. In those cases the person distraining had a choice of pounds, here there is only the public pound to which the distress must be taken, whatever the condition of the pound. Adverting again to the two branches of the facts in the case before mentioned, I say that if a person justifies the seizing and taking and delivering to the poundkeeper, he is responsible for nothing that happens after that. After such delivery the poundkeeper becomes alone responsible. If the original taking and delivery to the poundkeeper was illegal, then the impounder is liable for anything that happens after such taking, but where he does justify up to the time of delivery, where he has done no more than follow strictly the rights given him by the statute, he cannot be answerable for anything that happens after he has delivered the animals to the public poundkeeper. With every inclination to make the defendant liable if the law would allow it, I entirely agree with his Honor that the plea is an answer to the action.

Judgment for the defendant. (*q*)

Plaintiff's attorney—*Fitzhardinge & Sons.*
Defendant's attorney—*W. Willans.*

(*q*) Reported by R. E. O'Connor, Esq.

SEVIL *v.* HEATH. (*a*)

Practice—No signature to copy writ served—Irregularity—Delay.

The copy writ of summons served upon the defendant did not contain the name of the Police Magistrate who signed the original writ, nor was the day of the month stated. The defendant, acting upon the advice of his attorney, disregarded the plaintiff's proceedings altogether. The plaintiff signed judgment, and the cause came on for assessment of damages some months after the issue of the writ. Damages were assessed at £500, and the defendant subsequently moved in Chambers to set aside the service of the writ and all subsequent proceedings. *Hargrave*, J., granted the application with costs.

On appeal, *held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dissentiente*), that the omission of the signature in the copy writ was, at most, an irregularity only, and that the defendant's application was made too late.

MOTION to make absolute a rule obtained on the part of the plaintiff, calling upon the defendant to shew cause why an order of *Hargrave*, J., setting aside the service of the writ and all subsequent proceedings in this action with costs should not be rescinded.

A writ of summons in this action was duly issued and signed under the Act 13 Vic., No. 34, by the Police Magistrate at Maitland. The original writ was in proper form, but the copy did not contain the Magistrate's signature or the day of the month. A bailiff shewed the defendant the original and left with him the defective copy. He took it to his attorney at Maitland, who advised him to treat it as a nullity. The defendant consequently did not appear, and the plaintiff filed his declaration, signed judgment, and set down the cause for assessment of damages. At the May sittings the damages were assessed at £500. Some days afterwards, on the application of the defendant in Chambers, *Hargrave*, J., made the order now appealed against.

Butler, Q.C., and *Rogers* in support of the rule. No signature is necessary to a writ of summons. The form given in the schedule to the Common Law Procedure Act has no signature. It is necessary for a writ to be tested, but the *teste* need not be signed. [Sir JAMES MARTIN, C.J.: It has been the universal practice for the writ of summons to be signed as well as tested.] Yes, but I cannot find any rule to that effect. At any rate, the absence of the signature from the copy can amount to the most to an irregularity, and the defendant's delay puts him out of Court: *Gray* v. *Hough* (*b*). The defendant was served on the 13th of February, and no application was made till the 26th of May. He should have moved to set aside the service within the time limited for entering an appearance: *Edwards* v. *Collins* (*c*); *Holt* v.

(*a*) September 19. (*b*) Supreme Court, March 26th, 1874 (not reported).
(*c*) 5 Dowl. 227.

can see no ground, therefore, on which a Court of equity would now give the plaintiff relief.

Taking the third count and the fifth replication together, the strong ground of objection—as before to the third replication—is, that it is an attempt not only to set up a verbal agreement against a policy subsequently drawn up and issued, but to give greater efficacy to the verbal agreement than to the instrument under seal. Here is an instrument, as appears by the policy itself, signed by certain persons appointed by the company for that purpose, and sealed with the seal of the company, and then delivered to the plaintiff, who receives it without any complaint or observation. This instrument, so signed, sealed, and delivered, is, if the plaintiff's contention is to prevail, to be set aside by a prior verbal agreement. If such a course were to be allowed, the object and advantage of written policies would be altogether destroyed, and no insurance company would be safe.

Upon the third count, the ninth plea and fifth replication taken together, I am of opinion that judgment must be for defendant.

Judgment for defendant.

Attorney for plaintiff—*Bull.*
Attorneys for defendant—*Slade & Smith.*

RAND *v.* WILLIAMS (*a*).

Trespass—Pleading—Liability of person impounding in improper pound—Impounding Act, 29 Vic., No. 2.

A person lawfully impounding under the Act 29 Vic., No. 2, is not liable for the improper state of the pound (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.).

A declaration alleged that the defendant seized and took certain sheep of the plaintiff, and impounded them in a yard unfit and improper for such purpose.

Held (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.), that a plea justifying the seizing and taking under the Impounding Act was a sufficient answer to the whole declaration, as the allegation that the sheep were impounded in an improper pound was mere matter of aggravation.

Wilder v. *Speer* and *Bignell* v. *Clark* distinguished.

DECLARATION. That before, and at the time, &c., the plaintiff was possessed of a flock of stud breeding ewes and fat sheep of great value, whereupon the defendant seized and took the said ewes and sheep of the plaintiff and impounded them in a yard

(*a*) September 20.

unfit and improper for such a purpose, and kept them there impounded without food for a long time, &c. The declaration then alleged other impoundings of the same sheep in other yards similarly unfit and improper, and concluded with averment of special damage. There were also counts of trespass and trover, and a money count.

PLEAS. 1. Not guilty. 2. As to the first and second counts respectively, that before and at the time, &c., the defendant was in possession of certain lands whereof the defendant was then the occupant within the meaning of the Impounding Act of 1865; and because the said sheep were then trespassing upon the said lands, and doing damage thereto, the defendant seized and took the said sheep for the purpose of impounding them, and drove them to the public pound nearest to the said lands where the same were trespassing and doing damage as aforesaid, and impounded them in the said pound as a distress for the said damage, as the defendant lawfully might for the causes aforesaid, which are the alleged grievances herein pleaded to.

DEMURRER on the grounds:—1. That, as the defendant admits the several grounds to have been unfit and improper for the purpose, it is immaterial whether the defendant was or was not justified in seizing the said sheep. 2. That the plea confesses, but does not avoid, the cause of action stated in the first count. 3. That if the defendant was justified in impounding the said sheep, he was, in law, bound to impound them in a fit and proper pound; and, as the said plea admits that this was not done, the defendant, in seizing and taking the said sheep, became liable in this action.

Darley, in support of the demurrer. The several allegations of impounding in unfit and improper pounds are material averments, and not matter of aggravation. *Wilder* v. *Speer* (*b*) shews that it is the duty of persons impounding animals to impound them in a proper pound. This case is followed by *Bignell* v. *Clark* (*c*). Independently of these authorities, on principle a person distraining the cattle of another for his own benefit is bound to take proper care of them. [FAUCETT, J.: Could the sheep in this case have been put in any pound but the public pound? Is not the poundkeeper compelled by statute to keep the pound in order?] In *Wilder* v. *Speer*, the Judge, at the trial, so directed the jury, but his direction was overruled. Under our Impounding Act a person is not bound to impound in the public pound. He may impound on his own land for a certain time, and send notice to the owner, and recover damages and driving charges. Under section 24 he has an alternative remedy

(*b*) 8 A. & E. 547. (*c*) 5 H. & N. 485.

defendant goes to consult his attorney. That clearly shews that he thought there was something in it. The attorney gives advice which is clearly erroneous. All the cases shew that defective copies are not nullities; in fact some have surprised me, for in one case, where there was no copy at all, the service was treated as an irregularity only. Again, the defendant does not state that he did not actually know of the proceedings which were being taken. The defendant and his attorney chose to lie by and wait, and allow the plaintiff to go to all the expense he has incurred in going on with the action; and that is a course which, I think, we ought not to sanction. I do not think the defendant has come within proper time. If there had been an application by the defendant in due time to set aside the service, he would no doubt have succeeded. It may be a question whether we ought not to allow the defendant, on payment of costs, to come in and defend.

Rule absolute with costs. No order as to the costs of the summons in Chambers.

Darley applied, upon an affidavit of merit, for leave to set aside the judgment, defendant paying the plaintiff's costs.

PER CURIAM. Plaintiff's costs to be taxed. If paid by the defendant within sixteen days after taxation, judgment to be set aside. Proceedings in the action to go on in the meantime, as if the judgment were not set aside.

Attorneys for the plaintiff—*Cape and Westgarth.*

Attorneys for the defendant—*Rolin and Salter* (for *R. W. Thompson.*)

EX PARTE TONKIN AND OTHERS. (*a*)

Temporary Commons—Power of Trustees—36 Vic., No. 23.

The trustees of a permanent common have power to make regulations for the management of a temporary common in the same locality.

Per HARGRAVE, J., and Sir W. MANNING, J.; FAUCETT, J., *dissentiente.*

MOTION to make absolute a rule *nisi* for a *mandamus*, calling upon the Police Magistrate at Tumut to shew cause why he should not be ordered to hear a complaint of the applicants in respect of a breach of certain regulations made by them as trustees of the Adelong common. The only question now argued was whether, as such trustees, they had power to make regulations for the management of Crown lands set apart as a temporary commonage, and adjoining the permanent common.

(*a*) September 22.

Windeyer supports the rule. By s. 29 of the Crown Lands Occupation Act the Governor and Executive Council may proclaim and set apart temporarily any Crown lands for commonage purposes. By ss. 5 and 6 of the Crown Lands Alienation Act those lands cannot be sold as long as that temporary reservation exists. Section 29 of the Occupation Act also gives power to the Governor and Executive Council to make regulations for the management of such temporary common. That section is merely permissive, and has never been acted upon except by the 113th regulation under the Occupation Act. The power is virtually repealed by the Act 36 Vic., No. 23. [HARGRAVE, J.: Does the Act repeal the 29th section of the Occupation Act?] Impliedly it does; at least in so far as the 29th section gave exclusive power to the Governor and Executive Council. The preamble of the Commons Regulation Act shews that it applies to temporary commons just as much as permanent commons. [HARGRAVE, J.: Do any of the sections of the Act mention temporary commons?] No; they are mentioned in the preamble only. The Act could have been passed with no other object than the regulation of temporary commons. [FAUCETT, J.: Are not the words "granted and dedicated" used in reference to the commons dealt with by that Act?] Yes; but these temporary commons are dedicated: *Ricketson* v. *Barbour* (*b*).

Davis shews cause. The object of the Act, 36 Vic., No. 23, was only to incorporate the trustees of commons and to give them perpetual succession, not to extend their powers. Every word of the Act is open to only one construction—that the Act was intended to apply to permanent commons only. Thus in s. 2 we find the words "grant or dedication"; "holding such common in perpetuity." In s. 6 the words "granted or dedicated" occur again. Section 11 deprives the trustees of the power of granting leases. All these terms and provisions are clearly inapplicable to temporary commonages. The words in section 29 of the Occupation Act are "proclaim and set apart," not "grant or dedicate." "Dedication" is the word used in sections 3, 4, 5, and 6 of the Alienation Act in reference to permanent reservations. Unless the Act plainly takes away the power of making regulations from the Governor and Executive Council, it will not be construed inferentially to repeal that power. [Sir WILLIAM MANNING, J.: What effect do you give to the mention of temporary commons in the preamble?] The regulations then in force authorised the Government to place the temporary commons in charge of the trustees of the permanent commons, and the object of the Act was to fix how those trustees were to be elected. But

(*b*) *Ante*, p. 72.

the trustees have the power of making regulations only for the management of the permanent commons; they can only take charge of the temporary commons subject to the regulations of the Governor and Executive Council.

Windeyer. The section taking away the power of granting leases clearly shews that the Act was intended to embrace temporary as well as permanent commons.

HARGRAVE, J. I do not think that anything in the Crown Lands Occupation Act is repealed by the Commons Regulation Act. If there is not an express repeal of the power given to the Governor and Executive Council to make regulations, there is certainly nothing in the later Act amounting to a repeal by implication. Nothing is repealed by that Act except the 11 Vic., No. 31. But I am of opinion that the Governor and Executive Council have exercised the power by making the regulation which has been referred to, numbered 113 in the old regulations and 78 in the new. I do not look on that regulation as prescribing what the Government might do, but as shewing what they were actually doing. It is as follows: "Crown lands not reserved for or dedicated to any other purpose within the limits within which lands adjacent to any town are not open to pastoral lease under the Act, will ordinarily be devoted to temporary commonage, and placed, with any lands already set apart for that purpose, in the charge of the trustees (if any) of the permanent common in the same locality." I read that as a regulation made by the Governor and Executive Council under the authority of section 29 of the Occupation Act, by which they place these temporary commons under the control of the trustees of the adjacent permanent commons, while power is reserved to deal with the lands for other purposes. The regulation cannot be understood as a mere recital of what the Governor and Executive Council have power to do, or what they mean to do, but as an exercise of the power. Then the Commons Regulation Act may be read without conflicting in any way with the Occupation Act; it merely clothes the trustees with legal vitality to do what the Governor and Executive Council have by the regulation given them the power to do. It seems to me that by the 78th regulation the Governor and Executive Council have cleared themselves of the power given to them by section 29 of the Occupation Act.

FAUCETT, J. By the preamble to the Commons Regulation Act the Legislature has shewn an intention to do more than the Act has actually done. It is quite impossible to apply the words in the body of the Act to anything put permanent commons, and I do not see how we can include temporary trustees of temporary commons in its provisions. The creation of trustees with

perpetual succession and a common seal, and with a capacity for holding the common in perpetuity, shews that the words "every common" in the Act must be read as meaning only "every *permanent* common." Then the commons mentioned in the Act are spoken of as "granted or dedicated." It is quite against the rules of construction to hold those words to apply to temporary commons. Wherever these words are used in the Crown Lands Acts, permanency is implied. "Proclaiming and setting apart" is not equivalent to a grant or dedication.

I agree that the 78th regulation was intended to bring the temporary commons under the control of the trustees of permanent commons; still, some action ought to be taken on the reserving of each temporary common before it becomes subject to the management of the trustees. The words "will *ordinarily* be devoted to temporary commonage" shew that the Government reserve a power so to devote them or not at pleasure. It appears to me that the powers of management can easily be obtained by these trustees through the action of the Governor and Executive Council, but that at present, and until something further is done, they have no such power.

Sir W. MANNING, J. I have no difficulty whatever on the question of the construction of the Commons Regulation Act. It puts temporary and permanent commons on exactly the same footing. The benefit of the Act, as well as the expression in the preamble, goes to shew an intention on the part of the Legislature that it should apply in one case just as much as in the other. If land is to be a common at all, it must be used as a common. We are asked to draw a distinction which is not to be found in the Act itself. It speaks of "every common;" and why should its terms be restricted to only one class of commons, especially when the reason of the thing demands that both kinds of commons should be treated in the same way? No real difficulty arises from the creation of corporations with perpetual succession. The inconveniences which the incorporation is intended to prevent might occur just as well in one year as in many, just as much in the case of a temporary as of a permanent common. Hiatuses in the succession of the trustees would be equally inconvenient in either case. The preamble so clearly includes temporary commons that I think we ought not, by an arbitrary construction, to exclude them from the scope of the Act. I am, therefore, inclined to think that the trustees have power to make regulations for the management of the temporary common. Still the power of the Governor and Executive Council is not destroyed, and their regulations would have superior force and effect. But, saving any matter in which the Governor and

Executive Council think it right to interfere, I think regulations, not inconsistent with the powers of the Governor in Council, may be made by these trustees.

Rule absolute.

Attorney for applicants—*Fell.*

Attorneys for respondents—*McCarthy, Robertson, & Fisher.*

ELLIS *v.* MEYERFELD. (*a*)

Practice—Inspection of documents—Confidential reports.

In an action for damages for breach of a contract to purchase a vessel, "if, on seeing her on the slip, she was good," an application was made by the plaintiff for inspection of reports made to the defendant by S., a marine surveyor, whom he had employed to inspect the vessel.

Held, that they were not documents to the production of which the plaintiff was entitled.

MOTION to make absolute a rule *nisi* to rescind an order of *Hargrave*, J., dismissing with costs an application for leave to inspect the documents enumerated in an affidavit of documents made by the defendant in this action. The defendant objected to produce two telegrams dated the 27th of July, a telegram dated the 4th of August, and two reports dated the 6th and 7th of August respectively, on the ground that they were private telegrams and reports for his own information from persons employed by him. His Honor's attention was not called to the fact that the defendant made no objection to the production of the other documents mentioned in his affidavit, and the application was refused, as a whole, with costs.

From the affidavits it appeared that there had been negotiations between the plaintiff and the defendant as to the purchase of a vessel called the "Cito," belonging to the plaintiff. Defendant telegraphed to the plaintiff that he would take the vessel if, on seeing her on the slip, she was good. She was accordingly placed on the slip, and was there inspected by Captain Sustenance, a marine surveyor, on behalf of the defendant. The telegram of the 4th of August, and the reports of the 6th and 7th of August, were sent by Captain Sustenance to the defendant.

The action was brought for damages for breach of a contract to purchase the vessel, and the present application was made before declaration.

M. H. Stephen, in support of the rule. We admit that we are not entitled to inspect the two telegrams of the 27th of July, but

(*a*) September 7.

the cases clearly shew that we have a right to see reports made to the defendant by persons employed by him. In *Woolley* v. *The North London Railway Company* (*b*), the Court allowed inspection of reports made by agents of the company for the purpose of conveying information to the company. There the defendants objected that they were confidential communications, and related exclusively to their own case. Here Captain Sustenance's reports were made without reference to any litigation begun or anticipated, and in the ordinary course of his duty as a marine surveyor employed by the defendant. The ground of the decision in *Cossey* v. *The London, Brighton, and South Coast Railway* (*c*) was that the reports there were held to have been made with a view to anticipated litigation. *Skinner* v. *The Great Northern Railway Company* (*d*) is to the same effect. *McCorquodale* v. *Bell* (*e*) decides that inspection cannot be resisted on the ground that communications are confidential. *Kerr on Discovery* (*f*) was also referred to.

Darley shews cause. In *The Macgregor Laird* (*g*), Dr. *Lushington* says:—"I have examined the cases at common law on this subject, but the whole question appears to me to be in a state of darkness and confusion." *Richards* v. *Gellatly* (*h*) is an authority against the inspection in this case. *Brett*, J., says:—"Those letters, however, could not have been put in evidence by the plaintiff; and the fact that documents might afford useful materials for cross-examination has never been held a ground for inspection;" and *Grove*, J., upon a suggestion by counsel *arguendo* that the letters might furnish material for the cross-examination of the adverse witnesses, says:—"Do you find any case where inspection has been allowed on that ground?" In the present case the only use of the reports asked for would be to cross-examine Captain Sustenance. The 3rd proposition in *Wigram on Discovery* (*i*) states:—"The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his own case." And the right to discovery at common law is narrower than that recognised in equity: *Day's Common Law Procedure Acts* (*j*). If the Court can gather, from the materials before them, that the documents do not go to establish the case of the applicant, inspection will be refused: *Chartered Bank of India* v. *Rich* (*k*).

(*b*) L. R. 4 C. P. 602. (*c*) L. R. 5 C. P. 146. (*d*) L. R. 9 Ex. 8. (*e*) L. R. 1 C. P. Div. 471. (*f*) pp. 102, 174, 247, 250. (*g*) L. R. Adm. & Ecc. 307. (*h*) L. R. 7 C. P. 127. (*i*) p. 261. (*j*) p. 298. (*k*) 4 B. & S. 73; L. J. Q. B. 304.

Stephen in reply. At any rate we were entitled to an order for the inspection of those documents as to which there was no objection, and his Honor's order is wrong to that extent.

Sir JAMES MARTIN, C.J. The question in this case is whether the plaintiff, who is bringing an action for the purchase money of a vessel alleged to have been purchased by the defendant, is entitled to the inspection of certain documents in the possession of the defendant. [His Honor stated the nature of the documents.] Upon application made to a Judge in Chambers, the defendant admitted in his affidavit that he had the documents, but objected to produce them. The Judge dismissed the application with costs.

It is to be regretted that the greater part of this day should be taken up in deciding whether the plaintiff can be entitled to look into documents which can be of very little use to him at the trial. They might tend to discredit the testimony of the marine surveyor if he were called as a witness for the defendant; but that is no reason for allowing inspection. Another reason why the plaintiff desires to see them is, no doubt, that if they were favourable to the ship, he might subpœna Captain Sustenance as his witness; but that, also, is no ground for granting this application. We have been referred to a great number of cases from which it is difficult or impossible to draw any general rule. The great number of these cases shews the persistency of persons conducting actions in attempting to find out beforehand the evidence on which their opponents rely. The Judges in England have had extreme difficulty in dealing with the facts in each case, and some of the expressions used are not at all consistent. Some of the dicta appear to limit the discretion of the Courts of Common Law in the matter of discovery. In the case of *Woolley* v. *The North London Railway Company* (*l*), some sensible remarks are made by Mr. Justice *Keating*. He says:—"It is not always easy to say what may or may not be made evidence in a cause, nor is it necessary, upon an application of this sort, that the document inspected should be shewn to be capable of being given in evidence. *If it be quite clear that a document cannot be given in evidence, that may, perhaps, be a ground for rejecting inspection.* But I cannot say that the document may not be evidence." I cannot see why a litigant should be entitled to go into the other camp and get a document which he cannot use as evidence at the trial. The statute leaves the very widest discretion possible to the Court or a Judge. "The Court or Judge may make such further order therein *as shall be just.*" If documents are in the hands of the other party, which would be clearly evidence for the party applying, then I think it would be "just" that he should have an opportunity of

(*l*) L. R. 4 C. P.

seeing them. And I can understand how, in railway accident cases, it should be "just" that the plaintiff should be allowed to inspect reports sent in by the officers of the particular company. The officers have a special knowledge of the actual facts of the case which are not ascertainable by the general public, and their reports would probably disclose the whole circumstances of the accident. Though the reports might not be evidence for the plaintiff, yet they would materially assist him in the conduct of his case. But when we are dealing with the case of letters passing between two private individuals, it seems to me not just that a person seeking to enforce a contract is entitled to see the private reports of a person employed by the opposite party to report upon the subject matter of the contract. Without at all presuming to say that the cases to which we have been referred are not law (for each of these cases was decided on its own particular merits), in the present case I do not think it would be "just" to allow the plaintiff the inspection he asks for.

I think his Honor was right in dismissing the application with reference to the disputed documents. As to the rest, the order ought to have been, and, no doubt, would have been, made if his Honor's attention had been called to the fact that the defendant made no objection to produce some of the documents. I think, therefore, the order ought to be varied.

HARGRAVE, J. I concur that my order ought to be varied. With regard to the decisions, it appears to me that any difficulty in reconciling them arises from reading the latter part of the 23rd section of the Common Law Procedure Act by itself. The first words, "to the production of which he is entitled for the purpose of discovery or otherwise," govern the whole clause, and the party must shew that there is a document to which he is so entitled. To my mind all the decisions are perfectly right, and the reasons given were perfectly good; but here Sir James Wigram's third proposition clearly applies. These are evidently documents which relate exclusively to the defendant's case. The plaintiff might as well ask for letters written by anyone else to the defendant relative to the subject matter of this action. According to the plaintiff's own story the contract was to buy the vessel, if good *in fact;* the opinion of the marine surveyor, whatever it was, cannot touch that question. But even if the documents were material, they must also be such as the plaintiff is entitled to have produced. The railway cases were altogether different; there the railway companies were public bodies, and their documents were, in a certain sense, public documents, which the plaintiff, as a member of the public, would have a right to see.

FAUCETT, J. I confess I find great difficulty in reconciling the cases. One principle, however, runs through them all—the plaintiff must shew that he is entitled to the production of the documents, and also that they tend in some way or another to make out his own case. It has been laid down that if a document tends exclusively to support the case of the opposite party, it is not producible. Another principle was laid down in the case of *The Chartered Bank of India* v. *Rich*, viz., that if the documents were of use merely for the purpose of shewing a flaw in the case of the opposite party, that would not be sufficient. It is impossible to see how the documents asked for here can go in any way to support the plaintiff's case. How can they be put in evidence by the plaintiff? We must look at the "fishing" character of this application. If the document is unfavourable to the plaintiff, he will not call the surveyor, but will keep back the documents for the purpose of breaking him down on cross-examination; if it is found to be favourable, he will call the surveyor as his witness.

Another ground on which I think the application ought to be refused is that the Judge in Chambers is given by the statute a discretion, which he has exercised, and with which we ought not to interfere.

Appeal dismissed. Order varied to stand for an order for the inspection of all documents set out in the defendant's affidavit except 2, 3, 16, 17, *and* 22. *Costs of the summons in Chambers and of the appeal to be costs in the cause to both parties.*

Attorneys for plaintiff—*Want, Johnson, & Want.*
Attorneys for defendant—*Holdsworth & Brown.*

McPHERSON *v.* THE BOROUGH OF BATHURST. (*a*)

Practice—Privy Council Appeal—Terms.

On fixing the terms of an appeal from a rule of Court ordering a new trial, the plaintiff was given leave to go on to a new trial, the amount of the verdict, if in his favour, to be paid into Court to abide the event of the appeal.

Darley, on the part of the defendants, moved for leave to appeal to Her Majesty in Council from the judgment of this Court, on the 26th of June last, making absolute a rule *nisi* for a new trial of this action.

Davis appeared for the plaintiff.

(*a*) September 7.

PER CURIAM (*b*). Leave to appeal. The defendants to give security in the sum of £300 to prosecute the appeal, and to pay such costs as may be awarded to the plaintiff. The plaintiff to have leave to proceed to a new trial, and, in the event of the plaintiff succeeding, the amount of the verdict and costs to be paid into Court by the defendants and invested. The costs of the rule for a new trial to be paid into Court by the defendants within a month and invested. The investments to abide the result of the appeal.

Attorney for the plaintiff—*Curtiss* (for *McIntosh, Pinnock and Price*).

Attorney for the defendants—*Driver* (for *A. G. Thompson*).

SANDEMAN *v.* COHEN (*a*).

Parties to Actions—Official Assignee suing as Trustee—Completion of Contract by Surety—Right to Sue.

Plaintiff, as official assignee of A., an insolvent, sued for the balance of payments due for work performed under a building contract between A. and the defendant. The defendant pleaded that before the sequestration A. abandoned the works under the contract, and that they were completed by W., one of A.'s sureties under a bond, to whom the defendant had given notice of A.'s default. The plaintiff replied, setting out the bond, from which it appeared that W. was liable in a penalty of £250 if A. did not finish the work, but was not bound to finish it himself. The replication went on to state that W. completed the work as and for A., "who thereupon and thereby duly finished the said work in accordance with the conditions of the said bond and under the provisions" of the original agreement under seal, and that the plaintiff was now suing for W., in order to recover the moneys due from the defendant for the benefit of W.

Held, upon demurrer (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; FAUCETT, J., *dissentiente*), that the replication was bad.

Per Sir JAMES MARTIN, C.J.: There was no obligation upon W. under the original agreement or the bond to complete the work, and it was done by W. under a new contract with the defendant, with which A. and his assignee had nothing to do.

Per HARGRAVE, J.: The work was performed on behalf of A. and under the original contract, but the official assignee of A. could not sue as trustee for W.

DECLARATION by the plaintiff as official assignee of the estate of one Allen: "For that the insolvent before his insolvency agreed by deed to perform the whole of the work required in the erection and completion of a first-class hotel at Young, according to the true intent and meaning of the plans and specifications and

(*b*) Sir JAMES MARTIN, C.J., HARGRAVE & FAUCETT, JJ. (*a*) September 13.

conditions annexed to the said deed, to the full satisfaction of defendant or of such person as he should appoint (thereafter called the supervisor of the works) for the sum of £4470; and the defendant by the said deed covenanted to pay to the insolvent the said sum of £4470 by instalments as the works proceeded, at the rate of £75 per cent. upon the work actually performed upon the certificate of the supervisor of works, so long as the work proceeded to his satisfaction, and the balance upon procuring a certificate that the whole of the works thereby contracted for had been completed. And the defendant afterwards appointed a certain person supervisor of the said works, and the said supervisor so appointed as aforesaid gave certain progress certificates under the said contract; and the whole of the works contracted for under the said deed had been completed to his full satisfaction, and the defendant had paid to the insolvent a certain portion of the moneys due under the said deed, and all conditions, &c., to entitle the plaintiff, as such official assignee as aforesaid, to be paid all moneys due under the said deed, but the defendant has not paid the same, and the same still remains due and unpaid."

PLEAS. 2. (As to so much of the count as claimed a balance of £25 per cent. upon the work performed prior to the sequestration over and above the £75 per cent. in the said count mentioned). That before the completion of the works contracted for, and before the said sequestration, the said insolvent abandoned the said works, and thence hitherto failed and neglected to complete the same; and thereupon the defendant gave notice to W. J. Watson and W. C. Furland at once to proceed with the said works, the said W. J. Watson and W. C. Furland then being bound to the defendant by their bond under seal in the sum of £250 each that the said insolvent should, within the period of ten months from the 17th July, 1875, do, perform, execute, and completely finish, or cause to be done, performed, executed, and completely finished, all the said works; and the said W. J. Watson did then, upon receiving such notice, proceed with the said works, and after the said sequestration did complete the same; and the alleged certificates were certificates afterwards given by the said supervisor to the said W. J. Watson in respect of the performing and completion of the said work by him as hereinbefore mentioned. 3. The same plea as to work done after the sequestration.

REPLICATION. 2. That the bond in the said pleas mentioned was in the words and figures following, that is to say: [The bond was set out verbatim, the condition being "that if the said Allen (the insolvent) his executors or administrators shall, within the period of 10 months from the date of the above written bond,

do, perform, execute, and completely finish, or cause to be done, &c., all and singular the several erections, &c., mentioned, specified and particularised in the hereinbefore in part recited agreement and the plans, drawings, specifications and conditions in the said agreement referred to and every one of them conformably to the said agreement, plans, drawings, specifications, and conditions in all respects whatsoever and in a good and workmanlike manner to the satisfaction of the said Abraham Cohen or of such person or persons as he may from time to time appoint to supervise the works, then the above-written bond, &c."] And the plaintiff says that after the making of the said bond, the said W. J. Watson having been called upon, as in the said pleas respectively mentioned, duly completed the said work as and for the said insolvent, who thereupon and thereby duly performed, executed, and completely finished the said work in accordance with the condition of the said bond and under the provisions of the deed in the said pleas respectively mentioned. And the plaintiff further says that the right of action under the said deed having consequently, upon the insolvency of the said Allen, vested in the plaintiff, he is suing in this action for the said W. J. Watson, in order to recover from the defendant, for the benefit of the said W. J. Watson, the balance of the moneys due from the defendant under the said deed upon the completion of the work.

REJOINDER. 2. That the said works were completed by the said W. J. Watson as surety under the said bond, in fulfilment of his obligation thereunder and not otherwise, and not of his own money, and for his own benefit, and not for the benefit of the insolvent or of his estate, and not for, or by the authority of, the plaintiff.

CROSS-DEMURRERS to the replication and the rejoinder.

Darley (*Butler*, Q.C., and *Manning* with him) for the plaintiff. Here the defendant by calling upon the surety kept the contract alive, and the benefit of it passed to the plaintiff as Allen's assignee. In *Purcell* v. *Raphael* (*b*) it was held that the official assignee was the proper person to be paid under similar circumstances, and that the sureties could not recover. *Whitmore* v. *Gilmour* (*c*), *Gibson* v. *Carruthers* (*d*), *Beckham* v. *Drake* (*e*), shew that the right of action upon a contract made by an insolvent passes to his assignee. Watson could not sue the defendant, as there was no privity between them.

M. H. Stephen (*C. B. Stephen* with him) cites *Knight* v. *Burgess* (*f*).

Darley, in reply.

(*b*) 7 S.C.R. 138. (*c*) 12 M. & W. 808. (*d*) 8 M. & W. 321. (*e*) 2 H.L. 579. (*f*) 33 L.J. Ch. 727.

Sir JAMES MARTIN, C.J. In this case one Allen made a contract with the defendant to build a house for him, and the due performance by Allen of his agreement was secured by the bond of two persons, Watson and another. Allen failed to perform the contract in accordance with his agreement, and one of the sureties completed the work. Allen afterwards went insolvent, and the work being now completed, and defendant being, under the contract, bound to pay a final balance of £25 per cent. on the value of the whole work, the plaintiff, as the official assignee of Allen's estate, sues the defendant for the amount; and, as I gather from the pleadings, this action is instituted by the plaintiff as trustee for Watson and for his benefit.

[His Honor then stated the pleadings.]

The rejoinder is certainly a little ambiguous. It states that the said works were completed by the said Watson, as surety under the said bond, in fulfilment of his obligation thereunder; thereby seeking to imply that there was an obligation upon him under the bond to complete the work if not finished by Allen; but the bond itself, as set out at length in the replication, imposes no such obligation.

Now, Watson and his co-surety being in no way bound to complete the work, and the defendant having no right under their bond to call upon them to do so, he yet does give the notice; and Watson, being, as we have seen, under no obligation, does the work in accordance with the terms of the original contract with Allen, not because the agreement bound him to do it, but because the defendant gave him notice. It appears to me that what he did was not done under the original agreement at all, but under a new agreement between him and the defendant. It is said that Watson was "called upon" to do this work, but that makes no difference if there was no right to call upon him. On the face of the pleadings, there appears to have been simply a request on the part of the defendant and a compliance with that request by Watson. That may constitute a binding contract between the defendant and Watson, but it has nothing to do with the obligations under the original contract. The work appears to have been done by Watson on his own account; and the plaintiff, in his character as official assignee of Allen, has no concern with it. There is no necessity to go into the cases which have been cited, as they have no bearing upon the real point of this case. I think our judgment should be for the defendant.

HARGRAVE, J. I do not think the plaintiff is entitled to sue. The way I look at the case is this. It is quite clear that no new contract was made, for throughout these pleadings it is alleged that Watson did the work as surety under the original contract.

The only question is whether any liability is shewn by these pleadings on the part of Cohen to pay the plaintiff as representing either Allen or Watson for the work done by Watson in consequence of Allen's default. Clearly the plaintiff cannot recover for Allen, as he did not carry out his contract. And it is equally clear that there is no privity of contract between Watson and the defendant at all. But, even if Watson himself could sue, it is quite new law that an official assignee can sue as trustee for a third party. The surety ought certainly to be paid for the work he has done as surety, but I think he cannot recover from the defendant in this form of action.

FAUCETT, J. I am not prepared to agree with their Honors. It is clear that no one can sue on the deed except the insolvent or the official assignee. I am inclined to think that the work was done by Watson under the deed. Watson was under no obligation except to pay the £250 if Allen did not do the work. But the insolvent not having carried out his contract, the defendant gave notice to Watson to complete it. That was equivalent to saying: "If the work is not completed I shall hold you liable to the penalty." Why does he carry out the work? He does it for the original contractor, and to avoid the penalty. All the pleadings sufficiently allege that the work was done according to the deed, and certificates were given under the deed. If it were not so, Watson would still be liable to the penalty, as he could only defend an action on the bond by shewing that Allen had completed the work. Under the present decision of the Court, Cohen would be able to sue upon the bond, though of course he would only recover nominal damages. At the same time it is quite clear that an official assignee cannot sue as trustee for anyone except the creditors in the estate. The allegation of trusteeship is unmeaning. I speak with hesitation, and might agree with their Honors if I had more time to consider.

Judgment for the defendant.

Attorneys for the plaintiff—*Slade & Smith.*

Attorneys for the defendant—*Cape & Westgarth*
(for *Scarvell & Gordon.*)

EX PARTE PENNINGTON AND OTHERS. (a)

Real Property Act, s. 31—Noting Incumbrances on Certificate—Removal of Caveat.

The trustees appointed under the Underwood Estates Acts having applied to the Registrar-General to bring certain lands comprised in those Acts under the provisions of the Real Property Act, the Registrar-General refused to issue a certificate of title unless certain incumbrances created by the devisees under the will of James Underwood were noted on the certificate, and unless two caveats lodged against the application were removed.

Held, that the trustees took the estate freed and discharged from all the trusts or derivative interests arising under the will, and that such interests should not be noted as incumbrances on the certificate.

Held, also, that where a caveator has issued a writ, and judgment of *non. pros.* has been signed, the caveat is at an end.

Held, also (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dissentiente*), that where a writ has been issued and renewed, but there has been no service on the applicant, and the renewal has been in each case without any *præcipe*, and no further proceedings have been taken, the caveat must be removed by an application under the 82nd section of the Real Property Act.

This was a summons under s. 107 of the "Real Property Act," calling upon the Registrar-General to appear and to substantiate and uphold the grounds of his refusal to bring certain land under the provisions of the Act.

The applicants were the trustees appointed under the Underwood Estates Acts, 36 Vic. and 37 Vic. The first section of the Act 36 Vic. is in the following terms:—From and after the passing of this Act the legal estate of and in the lands and hereditaments devised by the said will of the said James Underwood shall for the purposes of this Act vest in [the trustees] their heirs and assigns as joint tenants. By section 2 power was given to the trustees to sell and convey the lands; "and thereupon the said lands and hereditaments so conveyed and the legal estate therein shall vest absolutely in the persons to whom the same shall be so conveyed, their heirs and assigns, or go and remain to such uses or in such manner as aforesaid, freed and discharged from any trusts created by the said will."

The following were the grounds stated by the Registrar-General on which he refused to issue the certificate of title to the applicants:—

1. The report of the judgment and order in *Ex parte Pennington* (*b*) appears to lay down certain directions, and to indicate a certain course of procedure which should govern this office in finally disposing of the present application, the title therein being in all essential points precisely similar to that upon which the directions of the Court were obtained in the case cited.

(*a*) September 4. (*b*) 13 S.C.R. 305.

2. The following extracts from the judgments of their Honors Mr. Justice *Hargrave* and Mr. Justice *Faucett*, as reported in the said case, indicate the course which the Court, by majority, declared to be proper for the office to pursue in regard to the application then before the Court; and the opinions of their Honors appear to the Examiners to be applicable in the present case. *Per Hargrave*, J.: "It was not enough to shew, as the Examiners had done, that there had been dealings at some previous time with the property; the incumbrances then imposed and those charges might then have ceased . . . . . Further, the Examiners were not called upon to make searches when a title was sent to them to report upon. It was no part of their duty. They were to advise upon the title presented to them, and not to go out of their way to find weak spots in them. A distinction must be drawn between the application and the certificate. After the application was received, it was fully advertised, and there were ample opportunities for people interested to object. Then, if no one objected, or lodged a caveat, the Registrar-General must issue a certificate, with incumbrances, which the Examiners were of opinion affected the title, endorsed on it. The application ought to be sent back to the Commissioners to take the further steps required by law to investigate the title." *Per Faucett*, J.: "Certain incumbrances on the land were discovered on reference to the books in the Registry Office to have once existed, but I agree with Mr. Justice *Hargrave* that the searches made at the instigation of the Examiners are not conclusive as to the present existence of these incumbrances. It is impossible to say that the applicants have omitted to state existing estates or interests. The Commissioners ought not to have rejected the application, but they should have inserted the usual advertisements and proceeded with the application in due course. Those interested could then have come in and made their claims, and any interests found to exist, and which the Legislature had been unable to ascertain, could be marked on the certificate. The Commissioners had made a mistake in rejecting the application; it should be sent back to the Registrar-General to cause the investigation of the title to be proceeded with." These expressions appear to amount to a direction of the Court that incumbrances affecting the title not represented before the Legislature at the time of the passing of the Underwood Estates Act, found by the Examiners to be in existence when the certificates should become due, should be noted on such certificate.

3. It is not for the Examiners to say that the notification of such incumbrances as those indicated in their Honors' judgments

is inconsistent with what appears to have been the unanimous opinion of the Court, that the Underwood Estates Acts had the effect of discharging, *upon sale and conveyance*, the land comprised in the testator Underwood's will, freed and discharged not only from the testamentary trusts, but from all other trusts or incumbrances (see the remarks of his Honor the *Chief Justice* at p. 315 of the Report); for it may be contended that such notification would only operate so long as the property affected by them remained unsold or unconveyed, and would disappear upon the execution of transfers.

4. Nor is it for them to deny that the existing incumbrancees have a right under the judgment of the Court to such protection of their interests before sales (which might be indefinitely deferred) as the notification of those interests might afford.

5. The incumbrances referred to in grounds 2, 3, and 4 are (although it is perhaps needless to point this out) such incumbrances as have been created by persons claiming interests under the will of James Underwood dated the 12th of March, 1840.

6. In addition to the above grounds, the effect of the two caveats lodged by or on behalf of William Meredith the elder, and Sydney Edward Underwood respectively, and of service of notice of proceedings thereunder having been taken, appears under the 22nd and 23rd section of the Real Property Act to be to compel the Registrar-General to suspend all further action in the matter of this application until such caveats shall have been disposed of as pointed out in the said 22nd section. As to the last mentioned caveat (viz., of S. E. Underwood), it is admitted that a certificate of the Prothonotary has been lodged to the effect that judgment of *non. pros.* in an action by S. E. Underwood as plaintiff (alleged to be the caveator) against the applicant, was entered on the 12th instant, but the Examiners cannot admit that such judgment is equivalent to a decision of the Court within the meaning of the 22nd section of the Real Property Act.

As to Meredith's caveat, the Prothonotary certified that on the 28th of April, 1876, a writ was issued in an action at the suit of Meredith against the trustees which had not been renewed in accordance with the provisions of the Crown Law Procedure Act. It appeared that the writ had never been served on the trustees as their attorney, but had been renewed since the date of its issue, though the Prothonotary had no knowledge of its having been renewed, no *præcipes* having been filed. [See *Ex parte Pennington and others, re Meredith's Caveat* (*c*).]

Owen, for the Registrar-General. Section 31 of the Real Property Act requires that the Registrar-General shall note in the

(*c*) *Ante*, p. 317.

certificate "the particulars of all unsatisfied mortgages or other incumbrances, or of any dower, lease, or rent-charge to which the land may be subject." Here the doweress, for instance, would have no remedy if the dower were not endorsed, for the land might not be sold for years. Section 40 gives the registered proprietor the land "subject only to such incumbrances, liens, estates, or interests whatsoever, as may be notified on the folium of the register book constituted by the grant or certificate of title of such land, but absolutely free from all other incumbrances, liens, estates, or interests whatsoever." The trustees do not ask for this certificate to enable them to sell—they have full power to do that without any certificate—but in order to acquire an indefeasible title and extinguish the interests of all the incumbrancees.

M. H. Stephen and *Davies* for the trustees. Why should the incumbrances created by the beneficiaries under the will of James Underwood be noted, when this Court has already decided that all the trusts of the will and all derivative interests under them have been swept away as incumbrances by the Act of Parliament? We have no objection to incumbrances created before the death of James Underwood being noted. The only claim that subsequent incumbrancees now have is upon the funds in Court. Besides, as the legal estate is in the trustees by virtue of the Acts, there would only, at the most, be equitable incumbrances; and by section 66 the Registrar can take no notice of trusts.

Paterson, for the caveator Meredith. By section 22 it is provided that lands, in respect of which a caveat is lodged, shall not be brought under the provision of the Act until such caveat shall have been withdrawn, or shall have lapsed from any of the causes hereinafter provided, or until a decision shall have been obtained from the Court having jurisdiction in the matter. The 23rd section enacts that a caveat shall lapse unless the caveator "shall have taken proceedings" within three months, and shall have given notice thereof to the Registrar-General. If he begins proceedings the caveat cannot afterwards lapse—that is not contemplated by the Act. The only course an applicant can take, if the caveator does not go on with the proceedings, is to summon him under section 82 to shew cause why the caveat shall not be removed. Here the application is not under section 82, but under section 107. Besides, the writ has been renewed in accordance with the Common Law Procedure Act.

Owen, in reply.

Sir JAMES MARTIN, C.J. In this case the Registrar-General has refused to bring the property of the applicants under the Real Property Act, on two grounds:—1. That certain incumbrances arising since the death of James Underwood should be

noted on the certificate; 2. That two caveats, forbidding the bringing of the land under the Act, are in existence. In *Ex parte Pennington and others* (*d*) this Court decided, amongst other points, that all these applicants had vested in this the legal estate in the property of James Underwood. There is an express decision of this Court that the effect of the Underwood Estate Acts was to vest in these trustees all the property freed of the trusts created by the will and any derivative interests under the will. It follows that between the death of James Underwood and the passing of the Acts there could be no disposition of the estate which could be regarded as an incumbrance. It seems to me to follow that the Registrar-General and the Examiners of Titles are not at liberty to regard any lien, mortgage, or interest of any kind affecting the property during that period. They are, in consequence, wrong in insisting on placing on the certificate any such incumbrance. The incumbrances created before the death of James Underwood stand on a different footing, as, there being no schedule of properties to the Act, it is necessary to inquire what was the property passing by the will. I think that incumbrances created before the death of James Underwood ought to be noticed, but not those created since his death.

As to the other objection, in regard to the caveats being still outstanding, it is enacted by the 23rd section of the Real Property Act that, at the expiration of three months from the lodging of a caveat, it shall be deemed to have lapsed, unless the person by whom or on whose behalf the same was lodged shall, within that time, have taken proceedings in any Court of competent jurisdiction to establish his title. The words are peculiar. The caveator is not required to take and carry on proceedings, but only to take them. And it has been held in this Court that, by reason merely of delay, a person shall not be taken to have abandoned proceedings once commenced. I think, looking at this writ with the seals upon it, it is impossible to say that it has not been renewed. I must regard it as existing until proceedings are taken to set it aside. Having regard to the case of *Ex parte McIntosh* (*e*), we cannot say that the action has been abandoned. The trustees' course is to apply to set aside the writ on the ground of delay or improper renewals.

HARGRAVE, J. I concur with the *Chief Justice* upon the first point. The trustees have the estate freed and discharged from all trusts and derivative interests, which are not, therefore, properly speaking, incumbrances at all. Upon the second point I regret that I differ from his Honor. I think the caveat is gone. By

(*d*) 13 S. C. R. 305. (*e*) 10 S. C. R. 146.

his delay Meredith has shewn his intention not to proceed, and as he is before us now on this application, I think we can deal with his caveat and direct the Registrar-General to treat it as abandoned.

FAUCETT, J. Although I was much struck at first with what was said by Mr. *Owen* as to the wrong done to incumbrancees if there should be delay in the sale, I still, on the whole, agree with their Honors that all trusts created between the death of the testator and the passing of the Acts have been swept away by the Act. As to the other point, it is not of great consequence. I am not prepared to say that the document put before us is utterly worthless and that there is no writ in existence. And I think sufficient cause has been shewn by the Registrar-General for staying his hand, though taking proceedings, in my view, does not mean only commencing an action, but going on with it. I think that the Registrar-General was wrong as to Underwood's writ, right as to Meredith's.

By the order ultimately drawn up it was declared as follows:—

1. *That no particulars of any lease, mortgage, or instruments of any kind made or given by any of the devisees named in the will of James Underwood, the testator mentioned in the "Underwood's Estate Act of* 1873," *or by any person or persons claiming under them, shall be noted on any certificate of title which may be issued to the said applicants in respect of lands devised by the said will.*

2. *That a judgment of non. pros. having been signed by the said applicants in an action against them at the suit of Sydney Edward Underwood, the Registrar-General should proceed with the said application notwithstanding the said caveat.*

And it was ordered that, subject to the removal of a caveat lodged by the said W. Meredith against the said application (f), the Registrar-General do issue to the said applicants a certificate of title for the lands comprised in the said application, and that the said applicants do pay to the Registrar-General and to the said William Meredith respectively, or to their respective attorneys, the costs of and occasioned by the said summons.

Attorney for applicants—*Norton.*

Attorney for Registrar-General—*Williams* (Crown Solicitor).

Attorney for William Meredith—*A. W. Castle.*

(f) See *ante*, p. 317.

SANDEMAN *v.* ROBINSON. (*a*)

Detinue—Right of Property—Jus Tertii—Sales in insolvency not sanctioned by Chief Commissioner.

Plaintiff, as official assignee of W., made a contract with defendant for the sale of an engine belonging to W.'s estate. He then applied to the Chief Commissioner of Insolvent Estates for his approval of the sale. The Chief Commissioner made no direction.

Held, that no interest passed to the defendant by the sale.

Plaintiff afterwards sold the engine, which at the time was in the possession of the defendant, to V. at auction, and guaranteed delivery.

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*), that notwithstanding the guarantee to deliver, the property in the engine passed to V. immediately upon the sale, and that the right of property being out of the plaintiff, he could not succeed in an action of detinue against the defendant upon the issue of not possessed.

Semble, *per* Sir W. MANNING, J., that a prospective general assent to a private sale being had would preclude the Chief Commissioner from disaffirming a particular sale, except on the ground of fraud.

DECLARATION by the plaintiff as official assignee of the estate of one West for the detainer by the defendant of an engine and fittings belonging to that estate.

PLEAS. 1. *Non detinet.* 2. Not possessed.

The action was tried in May last before Sir *W. Manning*, J., and a jury at the Sydney sittings, when a verdict was given by consent for the plaintiff for £100 (the value of the engine) and 40s. damages, leave being reserved to move to enter the verdict for the defendant, the Court to be at liberty to draw inferences of fact.

Defendant was in possession of an engine and fittings, having rented them from the insolvent for four years and a half at £25 a year. The lease was not in writing, and shortly after the sequestration of West's estate the plaintiff gave defendant a notice determining his tenancy. Defendant's attorney wrote to plaintiff's attorneys, stating that his client "does not intend to dispute the official assignee's claim, and that you are at liberty to take possession of the engine whenever you please," adding, "I presume that he had better retain possession of it until you actually require it to take it away." An agreement for a sale to the defendant for £150 was then made and was approved by the Commissioner, but went off; and subsequently letters passed between the attorneys on both sides offering and accepting £100 for the engine. The plaintiff then submitted the offer to the Chief Commissioner of Insolvent Estates for his approval, but he did not approve of it. The engine was then put up to public sale

(*a*) September 6.

by auction and sold to one Venables for £100. The auctioneer undertook on behalf of the plaintiff to put the purchaser in possession. The defendant refused to give up the engine either to Venables or the plaintiff, claiming it as his property.

By the Act, 25 Vic., No. 8, s. 7, "All sales in insolvency effected by or by the order of any official assignee shall, unless the Chief Commissioner shall in any case otherwise direct, be by public auction, of which six days' public notice at the least shall be given. And no sale by private contract shall be complete until approved under the hand of the Chief Commissioner."

Upon the written request of the plaintiff for the approval of the sale, the Chief Commissioner made the following minute:— "It is futile to submit private sales of such a loose character that they can be repudiated by the proposed contractor at his will and pleasure. The report of the 31st August, 1876, became utterly useless, through its being treated by the official assignee as if the former contract is waste paper. G. H. D."

A rule *nisi* was obtained in the second Term on the grounds: 1. That the sale of the engine to the defendant is shewn by the correspondence and facts proved to have been complete; and, accordingly, plaintiff could not maintain his action. 2. That the contract between plaintiff and defendant, notwithstanding the want of the Chief Commissioner's approval, vested the property in the defendant so as to prevent the plaintiff from maintaining this action. 3. That the Chief Commissioner not having actually disapproved of the private sale, the plaintiff cannot, under the circumstances shewn in the case, treat the defendant as a wrong-doer, and so maintain the action. 4. That the facts proved and to be inferred shew that the defendant became so entitled under the private sale as to entitle him to a verdict. 5. That on the auction sale the right to the property and to the possession, or one of them, passed to Venables, and therefore the plaintiff cannot maintain this action.

M. H. Stephen (*Davis* with him), for the defendant, in support of the rule. The correspondence between the attorneys established a sale to Robinson by the official assignee. Whether the Commissioner approved of the sale or not makes no difference in this action; the plaintiff cannot turn round and say that the defendant is a tort-feasor. Besides, there is no evidence that the Commissioner has actually disapproved, and as it is the business of the assignee to obtain the approval, he cannot take advantage of his own neglect. [Sir W. MANNING, J.: Does not the Commissioner's minute amount to a distinct disapproval?] If it is a disapproval, of course there is an end of the matter. But the other point is absolutely plain. The plaintiff in an action of

detinue must have the right of property as well as the right of possession: *Selwyn's Nisi Prius* (*b*); *Bullen and Leake's Pleadings* (*c*). The cases all shew that the property and the right to the possession must concur in the plaintiff, but that his property cannot be questioned by a wrong-doer or a bailee: *Leake* v. *Loveday* (*d*); *Phillips* v. *Robinson* (*e*); *Gadsden* v. *Barrow* (*f*); *Wilson* v. *Ampton* (*g*); *Jeffries* v. *Great Western Railway Company* (*h*); *Biddle* v. *Bond* (*i*). Here the defendant came lawfully into possession of the engine, and cannot therefore be treated as a wrong-doer; and the sale to him, whether complete or not, put an end to any bailment there might have been.

Darley and *Healy*, for the plaintiffs, were stopped on the first point. There are two complete answers to the arguments that the property is not in the plaintiff. In the first place, the defendant is our bailee, and the property remains in us under the contract of sale with Venables until delivery. When a vendor undertakes to deliver, the property does not pass until delivery. In *Benjamin on Sales* (*j*) it is stated that "it was held in a modern case in the Court of Exchequer (which seems not to have been reported) that the property in a specified chattel bought in a shop, to be paid for upon being sent home, did not pass before delivery." *Cockburn*, C.J., in *The Calcutta Company* v. *De Mattos* (*k*), says that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to shew that the thing sold was to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly." The judgment of *Bovill*, C.J., in *Heilbutt* v. *Hickson* (*l*), shews that where anything remains to be done to the thing sold before delivery, the property will not pass. Here there was an agreement that possession should be obtained from the defendant. Venables clearly cannot sue for the engine, because he has not paid for it. But we say that the defendant cannot set up the *jus tertii*. He has no title except as our bailee. The acknowledgment of his attorney that he held the engine for us, is evidence of his bailment. We rely on *Jeffries* v. *The Great Western Railway Company*. That Venables cannot maintain an action against the defendant is clear from *Lord* v. *Price* (*m*), where it was held that the purchaser of goods which remain in the possession of the vendor, subject to the vendor's lien for unpaid purchase-money, cannot maintain an action of trover against a wrong-doer. [Sir JAMES MARTIN, C.J., refers to *Logan* v. *Le Mesurier* (*n*); and *Bloxam* v. *Sanders* (*o*).]

(*b*) p. 583. (*c*) p. 292. (*d*) 4 M. & G. 972. (*e*) 4 Bing. 106. (*f*) 9 Ex. 514. (*g*) 1 B. & Ad. 450. (*h*) 25 L.J. Q.B. 107. (*i*) 34 L.J. Q.B. 136. (*j*) p. 241. (*k*) 32 L.J. Q.B. 355. (*l*) L.R. 7 C.P. 438. (*m*) L.R. 9 Ex. 54. (*n*) 6 Moo. P.C. 116. (*o*) 4 B. & C. 941.

Stephen is heard in reply.

Cur. adv. vult.

Sir JAMES MARTIN, C.J. (*p*). This is an action of detinue brought by the plaintiff as official assignee against the defendant for the detention of an engine and fittings. The pleas are—1. *Non detinet.* 2. That the engine, &c., are not the plaintiff's. At the trial a verdict was found for the plaintiff with leave to move to enter a verdict for the defendant, the Court to be at liberty to draw inferences of fact. Various grounds are set forth in the rule *nisi*, but they resolve themselves into two:—1. That the engine was sold and transferred by the plaintiff to the defendant; and 2 (the ground most relied upon). That the plaintiff cannot maintain this action because he has sold the thing sued for to one Venables, and, the property being in Venables, the plaintiff cannot sue.

As to the first point, I think the contention on the part of the defendant must fail. By one of our Insolvency Acts (25 Vic., No. 8, s. 7) it is provided that no sale by private contract shall be complete until approved under the hand of the Chief Commissioner. In this case there is no doubt whatever that there was a sale to the defendant. There was an offer of £100, followed by acceptance and payment. So that if it were not for the section I have referred to, the engine would have become the property of the defendant. But, inasmuch as no sanction of that sale was ever given by the Commissioner, the sale, though in fact made, operates nothing. I am of opinion that the minute of the Chief Commissioner was not only no ratification of the sale, but a distinct refusal to assent to it. I am therefore of opinion that there was no effective sale of the property in question in this action, inasmuch as the requisite consent of the Chief Commissioner was never obtained.

We come now to the second point. In this action it is necessary, if appropriate pleas are pleaded to raise the point, for the plaintiff to make out his property in the goods and his right to the present possession of them. The question is whether on this evidence the engine was the property of Venables or of the plaintiff. If it is the property of Venables, then the plaintiff is not entitled to succeed in this action. The general principles which govern sales of personal property are laid down in many text books. In *Chitty on Contracts* (*q*) I find it stated that "as to the change of property effected by such a contract, it is clear that, by the law of England, the sale of a specific chattel passes the property therein to the vendee, without delivery." That is the general rule, but there are certain well-known exceptions.

(*p*) September 7. (*q*) p. 350, 9th ed.

The rule is also set forth in the judgment of Mr. Justice *Bayley* in the case of *Bloxam* v. *Sanders*. He says :—"Where goods are sold and nothing is said as to the time of delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded *upon payment of the price;* but the buyer has no right to have possession of the goods *until he pays the price*. The buyer's [evidently a misprint for vendor's] right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivery of the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him." That I take to be a most accurate statement of the law, and it is quite consistent with what is said by Lord *Brougham* in delivering the judgment of the Privy Council in *Logan* v. *Le Mesurier*. It is now contended in this case that where there is a sale, even on credit, if the vendor engages to deliver and does not deliver, there is no change of property. That I take not to be the law. It appears to me that the property did pass in this case by the sale to Venables. That being so, and the right of property being out of the plaintiff, this action cannot be maintained.

HARGRAVE, J. We have to decide two very important questions in this case. On the first ground, I concur with his Honor the *Chief Justice*. It is quite clear that private contracts made by official assignees have no legal validity at all until they have been approved by the Chief Commissioner. It is most important to maintain this principle of our insolvency law that official assignees have no legal authority to sell, except by public auction, without special permission in each case.

With regard to the second point, I am compelled to differ from his Honor. Though the general rule upon contracts of sale undoubtedly is that the property passes to the vendee without delivery, I think in this case we should look beyond the bald general principle. "If the terms of the contract do not shew an intention of immediately passing the property until something is done by the seller before delivery of possession, then the sale cannot be deemed perfected, and the property does not pass until that thing is done." That is the rule Lord *Brougham* lays down

in the case referred to, and it applies, in my opinion, to the circumstances of the present case. Lord Chief Justice *Bovill's* judgment in *Heilbutt* v. *Hickson* shews how the intention that the property should not pass is shewn. "Such an intention is generally shewn by the fact of some further act being at first required to be done, *such as, for instance, in most cases, delivery*— in some cases actual payment of the price." His Lordship puts a stipulation as to delivery as an instance of the general rule laid down by Lord *Brougham*. Here the purchaser said in effect— "These goods are not in your possession; you must undertake to deliver; you must take steps to make Robinson give them." Does not this clearly shew that the intention of the parties to this contract was that the property should not pass until the goods had been obtained from Robinson? There is another reason why I think we should maintain the rule of law that the property does not pass where the vendor retains his right to recover possession against a third party. In *Frazer* v. *Evans* (*r*) we held that a delivery order passed the property in goods not in the vendor's possession. But it has never been doubted that a delivery order is required to pass the property, and we should be shaking the authority of that case and the common understanding of mercantile men by holding that the property in goods in the hand of a warehouseman or some other third party would pass by the mere contract of sale. The reason why a delivery order was held to pass the property was because it was treated in commercial usage as equivalent to a delivery of the goods themselves. I am of opinion that the verdict in this case was right and ought to stand.

Sir W. MANNING, J. With reference to the first question, I quite agree that the sale to Robinson cannot be taken to have been a good sale. I wish, however, to avoid going too far in deciding this point. I am inclined to think that if the Chief Commissioner had said before the sale "You may sell by private contract" (without specifying any particulars), and the official assignee had accordingly made a sale, the Chief Commissioner could not afterwards disaffirm that sale, unless indeed it was tainted by fraud. The effect of this Act seems to be only to make sales by auction the rule and private sales the exception, not to require the assent of the Commissioner to the details of each particular sale. I wish it to be still considered an open question whether a previous general assent of the Commissioner to a private sale would not be a sufficient compliance with the Act. Here, however, though the Chief Commissioner assented to a previous sale for £150, there is nothing to shew that he assented to the subsequent

(*r*) 6 S.C.R. 325.

negotiations which led to the offer of £100, and I see nothing sufficiently definite in the way of previous authorisation to preclude the Chief Commissioner from afterwards withholding his assent.

Then comes the other question. No doubt the circumstances in this case are very peculiar. The plaintiff has put himself in a very awkward position. In my opinion he cannot recover, as he has parted with the property in the goods to Venables. I quite agree that Venables cannot sue until he has paid the price. *Lord* v. *Price* and *Bloxam* v. *Sanders* are clear authorities that the buyer is not entitled to the possession of the goods until payment or tender. As to the right of property not having passed by the sale, I have no difficulty at all. There is nothing to take this case out of the general principle that the property passes to the vendee upon sale and before delivery. Mr. *Darley* has referred to the case of *Heilbutt* v. *Hickson*. There the circumstances were very different. In that particular case there was clearly something to be done to the shoes which were the subject of the contract—they had to be inspected and approved. Then it is said that the defendant cannot set up the sale to Venables. That can only be on the ground that he is a wrongdoer or a bailee. There is no pretence whatever for saying that he was a bailee. The offer to hold the engine for the plaintiff was a mere suggestion by his attorney and was never accepted or acted upon. Nor was he a tort-feasor. He was originally lawfully in possession as a tenant and afterwards under the contract of sale. The only wrong committed by him was not in taking possession, but in holding over when he had no title.

Rule absolute with costs to enter a verdict for the defendant.

Attorneys for the plaintiff—*Cape & Westgarth.*

Attorneys for the defendant—*Dwyer & Holley.*

KING *v.* THE BULLI COAL MINING COMPANY. (*a*)

Collision—Total Loss—Measure of Damages—Trover.

The plaintiff sued for damages for the running down of his yacht by a steamer belonging to the defendants. At the trial Sir *W. Manning*, J., told the jury that if they found that the yacht was not worth repairing, they might give the plaintiff a verdict for the full value, and that the defendants might retain the remains of the yacht. The jury found that the yacht was not worth repairing, and found a verdict for the plaintiff for £300, estimating that as the full value of the yacht.

Held, that the direction was right.

Held, also, that if a plaintiff claims as for a total loss and recovers a verdict on that footing, he cannot afterwards maintain an action of trover against the defendants for the hull, spars, &c., of the vessel which remain in their hands.

After the yacht was run down and sunk, the defendants raised her. The defendants' manager promised to send her to the yard of L., a boatbuilder in whom plaintiff had confidence, but afterwards had her taken to another wharf, put on shore there, and afterwards taken away to another boatbuilder's, and again removed without any notice to the plaintiff.

Held, *per* HARGRAVE, J., *semble*, *per* Sir W. MANNING, J., that these facts were evidence of a conversion by the defendants.

DECLARATION. 1. That the defendants by their servants so negligently and unskilfully navigated and directed a steamship of the defendants, that the said steamship ran foul of and struck against a vessel or yacht of the plaintiff, whereby the said vessel or yacht of the plaintiff was swamped, and sunk, and wholly destroyed, and divers goods of the plaintiff, then being in the said vessel or yacht, were also wholly destroyed, by means whereof the plaintiff has lost the use of the said vessel or yacht and been otherwise damnified. 2. Conversion of the yacht and certain goods of the plaintiff on board thereof.

PLEAS. 1. (To the first count). Payment into Court of £200. 2. (To the second count). Not guilty.

At the trial before Sir *William Manning*, J., and a jury, it appeared from the evidence that the yacht "Weirang," belonging to the plaintiff, while lying at her moorings in Farm Cove was run into and sunk by the defendants' steamer "Woniora." The plaintiff's brother saw the defendants' manager next morning. He offered to have the "Weirang" raised and repaired, Mr. King suggesting Langford as the boatbuilder to take her to. However, she was taken, when raised, to the A.S.N. Co.'s wharf in Johnson's Bay, and afterwards to the yard of Luke, a boatbuilder at Balmain, without the consent of, or any communication with, the plaintiff. Evidence was given on behalf of the plaintiff that she was not worth repairing as a yacht; that she might be repaired for £150, but would not be worth £150 when repaired; and that the

(*a*) September 10.

money spent upon her would be thrown away. The defendants' evidence shewed that she was worth repairing, and that a sum under £100 would put her in order. The yacht still remained in the possession of the defendants, and the hull, lead-ballast, spars, sails, &c., were estimated at a value of not less than £100. The jury gave a verdict for the plaintiff with £100 damages over the sum paid into Court, and specially found that the yacht was not worth repairing, and that her full value before the accident was £300.

A rule *nisi* was obtained in the second Term on the following grounds. 1. That upon the finding of the jury that the yacht was worth only £300, which was the defendants' contention, the defendants were in law entitled upon the evidence to have the verdict entered for them, as the sum paid into Court was admittedly greater than the difference between the sum of £300 and the value of the property after the injury. 2. That his Honor, it is submitted, was in error in holding and directing the jury that if they were of opinion that the yacht was so injured as not to be worth repairing as a yacht, it was the same (in analogy to a case under an insurance policy) as if it were a total loss, and the jury were then to take the value of the yacht, &c., as a whole, and give the plaintiff the full value, leaving to the defendants the damaged yacht, the sails, the lead, and all that belonged to her, which the defendants could then sell as their property. 3. That his Honor, it is submitted, was in error in directing the jury that in considering whether the yacht was a total loss, that is, not worth repairing, they were to consider the slur there would be upon her reputation as a yacht by reason of her having been run down. 4. This his Honor's ruling and direction as to the measure of damages under the first count was, it is submitted, erroneous. 5. That the verdict and the special finding that the ship was a total loss, that is, not worth repairing, were respectively against evidence.

M. H. Stephen and *Want*, in support of the rule. No authorities can be found in support of his Honor's ruling that the defendants would be entitled to the damaged yacht. The measure of damages is altogether different in a case of partial injury, and in an action for a constructive total loss under a policy of insurance. In the present case the measure of damages is what it would cost to put the yacht in the same state as she was in before the accident. Several witnesses said the repairs could be done for less than £100, and we have paid £200 into Court. There will be nothing to prevent the plaintiff now from suing us for the hull and the lead, though the jury have given him the full value. Running down a boat does not change the property

in her, and we have no title to retain her. Then it is said we have been guilty of a conversion, and that appears to have been the chief contention of the other side at the trial. *Stephenson* v. *Hart* (*b*); *Syeds* v. *Hay* (*c*); *Thompson* v. *Shirley* (*d*); and *Devereux* v. *Barclay* (*e*) were then relied upon by them. All these cases are distinguishable. In all of them the defendants had improperly parted with the possession of the goods to third parties. In no case has it been held that merely using another person's goods in a way contrary to his orders amounted to a conversion. So to hold would destroy all distinction between actions of trespass and trover. In all the cases referred to, the goods had been placed out of the control of the persons using them; here they still remain in our possession, and there has never been any demand or refusal. There is no pretence that we have been asked for them or have ever had any wish to detain them. Besides, an act, to amount to a conversion, must be *invito domino;* here Mr. King appears to have stood by and never to have made any objection when he saw us, as he says, ill-using his vessel.

Butler, Q.C., and *Darley* shew cause. It is said that there is no authority for his Honor's ruling. The *Columbus* (*f*) is a direct authority. In that case Dr. *Lushington*, while distinguishing collision suits from actions on policies for constructive total loss, yet applies the principle of abandonment to a case where the vessel ran down was not worth repairing. He held that the owner of a damaged vessel was not bound to go to any expense in repairing her or bringing her into port, and directed the proceeds of the sale of the damaged vessel to be paid to the other party. That is exactly what we are contending for here. We say they have run down our vessel and injured her so that she is now good for nothing, and that they may keep the remains of her if they pay us her full value. Then as to the trover count. Though *Fouldes* v. *Willoughby* (*g*) and some of the other old authorities go too far, it is clear law that to constitute a conversion it is not necessary that there should be an intention to deprive the owner of his property: *Hiort* v. *Bott* (*h*); *Fowler* v. *Hollings* (*i*). An unauthorised act, interfering with the owner's dominion and rights over his property, is sufficient: *Syeds* v. *Hay*.

Stephen, in reply. The *Columbus* was an Admiralty case. The Court there had full jurisdiction over the damaged ship, and could settle the rights of all parties. An order was made giving over the vessel to the party who had to pay damages for the collision. But that cannot be done here. The plaintiff would not be

(*b*) 4 Bing. 476. (*c*) 4 T. R. 260. (*d*) 1 Esp. 31. (*e*) 2 B. & A. 702. (*f*) 3 W. Rob. 158; 6 Notes of Cases 671. (*g*) 8 M. &. W. 540. (*h*) L. R. 9 Ex. 80. (*i*) L. R. 7 Q. B. 616.

estopped by the finding of the jury, for it is no part of the record. None of the cases referred to on the trover count at all touch the distinction between trespass and trover. *Drake* v. *Shorter* (*k*) is very much in point.

Sir JAMES MARTIN, C.J. In this case the plaintiff was the owner of a yacht which, while lying at anchor in Port Jackson, was run down by a steamer belonging to the defendants and lost. For this injury the plaintiff brought an action, claiming, in his first count, damages for the loss he had sustained by the sinking of the yacht, and, in the second count, which was in trover, the whole value of the yacht, which it was alleged the defendants had converted to their own use. The defendants paid £200 into Court on the first count, and pleaded not guilty to the count in trover. The jury gave a verdict for the plaintiff, with £100 as damages over the amount paid into Court, and also found specially that the yacht, when raised, was not worth repairing. His Honor, in summing up, likened the case to a case of total loss under a policy of marine insurance. He did not say that it was exactly the same case, but that it might be regarded as to some extent analogous. If the vessel, though not annihilated, was still so damaged as not to be worth repairing, he advised the jury to treat the injury as a total loss. One of the grounds taken for a new trial is that his Honor was wrong in that direction.

No doubt an action brought for the loss of a vessel under these circumstances does not rest upon exactly the same considerations as an action brought upon a policy of insurance in respect of a total loss, and I understand his Honor to have so ruled. Dr. *Lushington*, in the case of the *Columbus*, says: "If I am asked whether the principle of abandonment, as applied to insurance cases, applies to cases of collision, I would answer, no; and I entertain no inclination or intention to import into this Court, in cases of this kind, all the rules and principles which a long series of precedents have established as the law of other Courts in cases of insurance." The right of abandonment has grown up under the insurance law, and has been the subject of many decisions; and it has been adopted in the law of all civilised countries. It is, however, peculiar to insurance law, and all the decisions leave untouched the question with which we are now concerned, whether, when a vessel is injured to such an extent as not to be worth repairing, the injury may be regarded as *in fact* a total loss. Of course if a vessel is completely destroyed—sunk at sea, burnt, crushed on a reef—it would be clearly a total loss. But when a vessel is sunk in the harbour, and is afterwards

(*k*) 4 Esp. 165.

raised, it is said that, as there is no transfer of the property, and as the wreck still belongs to the owner of the vessel, he cannot recover the whole value as for a total loss. But it appears to me that he can claim the full value, and it will be a matter for the jury whether he is entitled to it. A man may abandon any property he has. He may throw his property into the street and anyone may pick it up, and he cannot bring an action of trover for it. So here, if the plaintiff has abandoned this vessel, he has waived all rights of dominion over her. In this case the jury have found that the yacht was injured in such a way as not to be worth repairing, and that her value as she stood at the time of the accident was £300, and it seems to me they were justified in finding for the plaintiff for the whole of that sum. And the plaintiff, it appears to me, put forward that claim, not so much in his declaration, where the words seem to me to have been inserted more as matter of aggravation than as a charge of total loss, as by the course he took at the trial and the line of argument adopted by his counsel. Having by his counsel claimed the whole value of the vessel, that would by itself be sufficient to shew such an abandonment by him of his right to the remains of the vessel as would preclude him from ever bringing an action to recover anything beyond the £300. He has recovered the full value, and he cannot recover any more. I think the rule should be discharged.

HARGRAVE, J. I concur with his Honor the *Chief Justice*. It seems to me that the facts of this case also entitle the plaintiff to a verdict upon the count in trover. The defendants exercised acts of ownership in raising this boat, taking her away to the A.S.N. Co.'s wharf and putting her upon the slip. What more could any owner have done? The other ground does not shew any misdirection on his Honor's part. What is complained of was not a direction on a matter of law at all, but mere judicial advice to the jury. It seems to me a good verdict both on the law and on the facts.

Sir W. MANNING, J. What I told the jury about total loss was suggested by the claim of damage in the declaration. I referred to insurance cases upon constructive total loss, but only by way of analogy. It seemed to me that if a vessel was not worth repairing; if she would be utterly useless as a yacht when repaired; her owner was not compelled to turn lead merchant or a seller of old spars; and that if she were worth nothing to him as a yacht, he ought to recover her full value. No authorities upon the point were cited at the trial, but I am glad to find so high an authority as Sir *Stephen Lushington* come to the same conclusion in the case of the *Columbus*. I think, therefore, that the verdict

ought to stand. Upon the question of the conversion the plaintiff is in a dilemma. It is not possible that there can be a verdict for the plaintiff upon both the counts. But if called upon to decide upon the trover count, I am disposed to think, in opposition to the view I took at the trial, that there was a conversion here. As to the question whether the plaintiff can hereafter sue for the value of the remains of the yacht, I do not see how he can, the jury having given him the full value.

Rule discharged with costs.

Attorneys for plaintiff—*Cape & Westgarth.*

Attorneys for defendants—*Allen, Bowden, & Allen.*

JOHNSON AND ANOTHER *v.* POOLE AND ANOTHER. (*a*)

Practice—Defendants out of the Jurisdiction—Process—Cause of Action arising within the Jurisdiction.

Defendants moved to set aside an order of Sir *William Manning*, J., under 17 Vic., No. 21, s. 16, giving leave to the plaintiffs to proceed in the action, on the grounds that the defendants were resident out of the jurisdiction, and that if judgment were obtained against them by default, the Supreme Court of Victoria would issue execution upon a memorial of such judgment without giving the defendants an opportunity for going behind the judgment.

Held, no grounds for setting aside the order.

The plaintiffs sued for commission due from the defendants in respect of the sale of a station. The employment of the plaintiffs was partly by letters passing between the defendants at Melbourne and the plaintiffs at Sydney, partly by communications between the plaintiffs and S., acting as agent of the defendants in Sydney. The sale was effected in Sydney, and the station was in New South Wales.

Held, that the cause of action arose within the jurisdiction.

The Brisbane Oyster Fishery Company v. *Emerson* explained.

The writ of summons in this action was issued, marked for service out of the jurisdiction, on the 3rd of July, 1877, and was served personally on the 9th and 10th of July on the two defendants at Melbourne, in the colony of Victoria. On the 17th of August Sir *William Manning*, J., upon the application of the plaintiffs, ordered that the plaintiffs should be at liberty to proceed in the action by filing their declaration and leaving a copy thereof at the last known place of above or office of the defendants in Melbourne, with sixteen days' notice to plead indorsed thereon, together with a copy of the Judge's order; and that, in the event of the defendants failing to enter an appearance and plead to the declaration within the time limited by the order, the plaintiffs should be at liberty to sign judgment, and that the amount for which the plaintiffs should be at liberty to sign final judgment

(*a*) September 19.

should be ascertained by the Prothonotary. The costs of the order were made costs in the cause. The declaration was for commission, and the particulars specially indorsed on the writ were, "To commission due from the defendants to the plaintiffs on the sale of Tenterfield Station, with the stock thereon, being at the rate of 1½ per cent. on £28,000—£420." "Interest thereon, &c.—£12 1s. 2d." The declaration and Judge's order were served on the defendants, in Melbourne, in accordance with the order of the 21st of August.

On the 4th of September *Davis* obtained a rule *nisi* to set aside the order of Sir *W. Manning*, J., and all subsequent proceedings, on the ground that the defendants were not resident within or amenable to the jurisdiction of the Supreme Court, and upon the grounds appearing in the affidavit of H. H. B. Bradley, upon which the rule *nisi* was obtained. Mr. Bradley's affidavit stated that he was attorney for the defendants, that they were resident in Victoria, and were never domiciled in New South Wales; that they had not at the time of bringing the action, or for some time previously, any property whatsoever, real or personal, in New South Wales; and that the plaintiffs threatened to sign judgment against the defendants when the time limited by the order expired, and intended to send a memorial of the judgment to Melbourne to be enrolled in the Supreme Court of Victoria, for the purpose of issuing execution thereupon. The concluding paragraphs of the affidavit were in the following terms:—

5. I am informed, and verily believe that the Supreme Court of the colony of Victoria have decided that, where the defendant in a case has allowed judgment to go by default in New South Wales, he cannot, on a summons to shew cause why execution should not issue on the memorial filed in the Supreme Court of the colony of Victoria aforesaid, contest the jurisdiction of the Supreme Court of New South Wales, but that the plaintiffs, having filed such memorial, had an absolute right to have an order made to issue execution on such memorial, and the Supreme Court of the colony of Victoria will not go behind such a memorial.

6. I am instructed that the defendants have a good defence to this action on the merits, and that the application, in support of which this affidavit is sworn, is not made for the purpose of delay, but solely for the purpose of avoiding the hardship and greatly increased expense of defending an action in this Court, at a distance from their domicile.

Long affidavits were filed on behalf of the plaintiffs, from which it appeared that the Tenterfield Station (formerly the property of the defendants) is in New South Wales; that the plaintiffs

received from Mr. S. A. Stephen, of Sydney, solicitor, acting on behalf of the defendants, particulars of the station and stock, and agreed to endeavour to effect a sale for 1½ per cent. commission. Communications afterwards passed between the plaintiffs and the defendants, and Messrs. Stephen and Stephen, and the plaintiffs placed the property under offer to several intending purchasers. The plaintiffs finally introduced Messrs. Readett and Simpson to Mr. Stephen, and their offer to purchase the station and stock for £28,000 was accepted. Demands were afterwards made on the defendants for the plaintiffs' commission, but no notice was taken by the defendants. Afterwards a Mr. Taylor, acting under a power of attorney from the defendants, came to Sydney and admitted the right of the plaintiffs to their commission. It also appeared that the defendants afterwards cancelled the sale to Readett and Simpson, but that a fresh sale was immediately made by the mortgagees of the station and stock, with the defendants' consent, to the same purchasers and for the same price.

The 16th section of the Common Law Procedure Act of 1853 (17th Vic., No. 21), is in the same terms *mutatis mutandis* as the 18th section of the Imperial Act (15 & 16 Vic., c. 76).

Davis, in support of the rule. It does not appear that the cause of action arose within the jurisdiction. In *Cherry* v. *Thompson* (*b*) the Court of Queen's Bench, following two earlier cases, decided that as the defendant in that case was in Germany, the breach of the contract occurred in Germany, though the letter which was evidence of the breach was addressed to and received in England. Here, in the same way, the defendants were all the time resident in Victoria, and the letters which passed between them and their agent, Mr. Stephen, and between them and the plaintiffs, could not constitute a cause of action arising within the jurisdiction. It may be said that Stephen had authority to bind the defendants, but his authority would be a part of the contract, and it could only be given by letters written from Melbourne.

Again, the Legislature of New South Wales had no power to pass the 16th section of the Common Law Procedure Act, or to bind British subjects out of the colony. In *The Brisbane Oyster Fishery Company* v. *Emerson* (*c*), Sir *James Martin*, C.J., says, referring to this very section :—"That section was adopted both here and in Queensland from an Imperial Act. There is no doubt that the Imperial Parliament can bind British subjects all over the world; but can a colonial Legislature bind anyone beyond the limits of their own colony?" and again : "Whatever the power of the Imperial Legislature upon all British subjects, wherever they may

(*b*) L.R. 7 Q.B. 575. (*c*) *Ante*, pp. 81, 86.

be, it cannot be contended for a moment that any colonial Legislature can bind persons residing out of its colony." Reference was made in that case to *Schibsby* v. *Westenholz* (*d*), which shews that a foreign judgment will not bind a defendant resident out of the jurisdiction of the foreign country. Mr. Bradley's affidavit shews that the Supreme Court of Victoria takes a different view from that taken by this Court in *Emerson's case*, and that if the defendants do not appear, the plaintiffs will be able to do what was condemned in that case, viz., obtain a judgment behind the backs of the defendants and enforce it afterwards against them in the country where they reside. That will be the certain effect of Sir *W. Manning's* order. The Court will not allow its process to be used for purposes of injustice. *The Brisbane Oyster Fishery Company* v. *Emerson* decided that a defendant ought to be sued in the country where he resides, and it would be inconsistent with that decision to allow the plaintiff to proceed with this action. The 5th section of the Stat. 13 and 14 Vic., c. 59, shews that this Court has no jurisdiction over a British subject residing in Victoria.

Darley shews cause. A Judge has jurisdiction to make the order complained of except when both the contract and breach are out of the jurisdiction. The Court of Queen's Bench decided otherwise in *Cherry* v. *Thompson* and earlier cases, but the rule laid down in *Jackson* v. *Spittal* (*e*) by the Court of Common Pleas is now the law of all the superior Courts in England: *Vaughan* v. *Welldon* (*f*). Here both the contract and the breach were within the jurisdiction. The plaintiffs made their contract with Stephen here, the negotiations with the buyers were carried on here, and the breach was the non-payment here of the commission which the plaintiffs had earned; besides, an account was stated here with Taylor, who represented the defendants. The question then is whether, the Legislature having given a power to a Judge to be exercised under certain circumstances, he can refuse to exercise it when those circumstances have arisen? It would be a strong thing for this Court to hold that the Legislature has exceeded its functions in passing the 16th section of the Common Law Procedure Act, and that, although the Legislature has said "it shall be lawful," it is not lawful for the Court or the Judge to make such an order. But really the question of jurisdiction does not arise here at all. This is a mere matter of procedure in this Court. The Common Law Procedure Act does not affect to extend the jurisdiction of the Supreme Court, and only regulates the mode of practice and procedure. And the 16th and 17th sections are in lieu of the old proceedings by outlawry and distringas.

(*d*) L.R. 6 Q.B. 155. (*e*) L.R. 5 C.P. 542. (*f*) L.R. 10 C.P. 48.

Order XI., Rule I., of the New Judicature Act contains exactly the same provisions. Numerous cases have been decided on this and the following section: *Allhusen* v. *Malgarejos* (*g*); *Sichel* v. *Borch* (*h*); *Durham* v. *Spence* (*i*); *Cherry* v. *Thompson*; *Jackson* v. *Spittal*; but the present objection, which would have been fatal, has never yet been taken. And even before the Common Law Procedure Act the Courts in England exercised a jurisdiction over transitory causes of action without reference to the residence of the plaintiffs or defendants. The jurisdiction and practice before the Common Law Procedure Act are stated at length in the judgment of *Brett*, J., in *Jackson* v. *Spittal* (*j*) in which he refers to *Ilderton* v. *Ilderton* (*k*) and *Mathews* v. *Erbo* (*l*). In the last mentioned case "it was moved to set aside an execution upon an outlawry against the defendant upon affidavit that the defendant was an alien merchant, and lived beyond the sea, and was commorant there during all the time that the plaintiff proceeded to outlaw him. But it was denied by the whole Court, because by this means any person might contract debts and go beyond the sea, and so he will be out of the reach of the law." *Schibsby* v. *Westenholz* has no direct bearing on the present case, but there are some remarks in the judgment of *Blackburn*, J., in point. Referring to the very section now under consideration, he says (*m*): "Should a foreigner be sued under the provisions of the statute referred to, and then come to the Courts of this country and desire to be discharged, the only question which our Courts could entertain would be whether the Acts of the British Legislature, rightly construed, gave us jurisdiction over this foreigner, *for we must obey them.*" *Reimers* v. *Druce* (*n*) and *The Bank of Australasia* v. *Nias* (*o*) were also referred to.

Davis, in reply. This is not a mere question of procedure. The writ is not only a notification of proceedings, but an order of this Court commanding the defendants to appear. We say the Court has no jurisdiction to make any such order. Outlawry and distringas, for which the procedure in these sections was substituted, only applied to foreigners who had property in England. In *The Brisbane Oyster Fishery Company* v. *Emerson*, the *Chief Justice* says (*p*):—"Wherever persons have, either expressly or by implication, agreed to be sued in a foreign country by a foreign tribunal, then, notwithstanding the general principle that the judgment of a Court cannot bind persons residing out of its jurisdiction, they are liable in an action on the judgment obtained against them in their absence and even without their knowledge."

(*g*) L.R. 3 Q.B. 340. (*h*) 33 L.J. Ex. 179. (*i*) L.R. 6 Ex. 46. (*j*) p. 549. (*k*) 2 H. Bl. 162. (*l*) 1 Ld. Raym. 349. (*m*) L.R. 6 Q.B. 159. (*n*) 23 Beav. 135. (*o*) 16 Q.B. 717. (*p*) *Ante*, p. 85.

That is not the case here; nor have the defendants brought themselves within any of the exceptions to the general rule. They have never been resident here; they have no property in the colony; nor have they agreed to submit to the jurisdiction.

Sir JAMES MARTIN, C.J. In *The Brisbane Oyster Fishery Company* v. *Emerson* the application was with reference to a judgment signed in the Supreme Court of Queensland. It was sought to enforce that judgment here against the defendant, who was resident in Sydney. This Court then held that, whatever might be the law of Queensland as to process, a judgment obtained there, as that judgment was obtained, was not enforceable here. That was all that case decided. We did not then go into the question of process at all, but only into that of jurisdiction, and we decided the case on broad grounds of international law. But we have now to deal with a different question.

The present application is to set aside an order of Sir *W. Manning*, J., giving leave to the plaintiffs to proceed with an action against the defendants, who are British subjects residing at Melbourne, out of the jurisdiction of this Court. Affidavits were before the Judge, and are now before us, sufficient to bring the case within the 16th section of the Common Law Procedure Act, by shewing that there is a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made within the jurisdiction. Under these circumstances, it appears to me that a duty is cast upon the Court or a Judge by that section, and that we are not at liberty now to go into the question whether a judgment obtained in this action will be efficacious out of the jurisdiction. What may be done on that judgment in the colony of Victoria it is not for us to say. What ought to be done will be, it seems to me, what we did in *The Brisbane Oyster Fishery Company* v. *Emerson*. I should imagine that the Supreme Court of Victoria would have no difficulty in applying well-known principles of international law, and following the same course as we took. But we have nothing to do with that question now. We have to deal with a statutory power and a statutory duty cast upon this Court, and it appears to me that we ought to deal with the application in the same way as Vice-Chancellor *Wigram* did in the case of *Whitmore* v. *Ryan* (*q*). Lord *Westbury*, in *Cookney* v. *Anderson* (*r*), took a different course; but in a later case, *Drummond* v. *Drummond* (*s*), the Court of Chancery Appeal agreed with the Vice-Chancellor. Lord Justice *Turner* says in the course of his judgment: "The question in this case, as I view it, is not against whom, and under what circumstances, or with relation to what property, the Legislature of a country may be

(*q*) 4 Ha. 612. (*r*) 1 D. G., J. & S. 365. (*s*) L. R. 2 Ch. App. 46.

justified in authorising the process of its Courts to be served out of the jurisdiction of those Courts, but whether the Legislature of this country has not in fact authorised the process of this Court to be so served." Those words apply to the present case, and, inasmuch as the only question before us is whether the Judge's order ought to be set aside, and as I think that order was properly made, this rule ought to be discharged.

HARGRAVE, J. The facts in this case are very simple, and require only to be stated. There was a station within the jurisdiction; all the negotiations with reference to its sale were carried on here; the plaintiffs carry on business here; and every element in the transaction, except the personal presence of the defendants, was within the jurisdiction of this Court. In this state of things the plaintiffs bring an action, and Sir *William Manning's* order gives the defendants every opportunity of defending themselves. I think we ought to assume that the Supreme Court of Victoria will give the defendants full justice if they choose to come there against any judgment which may be obtained here in this action.

FAUCETT, J. I am entirely of the same opinion. We are not called upon to decide whether the sections of the Common Law Procedure Act regulating service out of the jurisdiction are in conflict with the powers of our local Legislature. I am disposed to think that they are not, because the provisions are similar to those relating to foreigners in the English Act. Besides, how does the 16th section go any further than the Absent Defendants Act? in fact, it contributes much more to justice than that Act. Under that Act a person may find his property seized and sold without any notice of the proceedings. Under the 16th section there is no compulsion upon the defendant to appear, when he is served with notice, and if he has no property here, no steps can be taken to enforce the judgment except through the Courts of the place where he resides. And here the requirements of the statute were followed, and his Honor was bound, in my opinion, to make the order.

By this decision we do not contravene *The Brisbane Oyster Fishery Company* v. *Emerson* in the slightest degree. There we held that the Act 19 Vic., No. 2, was not intended to apply to a case where the defendant had always resided in this colony. It will rest with the Court of Victoria whether the judgment in this case will be enforced or not. The full extent to which that decision went, was that we would not enforce such a judgment as the one in that case in the summary way provided by the Act 19 Vic., No. 2. I am disposed to think that Mr. Bradley must be mistaken in some of the statements in his affidavit. I have a very high opinion of the Judges in Victoria, and feel sure that they

would be guided by the English decisions, which we followed in *Emerson's case.*

Rule discharged—Costs to be costs in the cause.

Attorneys for plaintiffs—*Want, Johnson, & Want.*
Attorneys for defendants—*Bradley & Son.*

HALL *v.* IVORY. (*a*)

Evidence—"In good and sound order and condition"—Absolute or Relative Soundness.

The plaintiff sued for the balance of the purchase money of a race-horse. The defendant pleaded that he had returned the horse to the plaintiff "in good and sound order and condition," as he was at liberty to do under the contract. At the trial the Judge rejected evidence to shew the treatment of the horse while he was in the defendant's possession, and evidence of the state and condition of the horse when he was first delivered to the defendant.

***Held*, that his Honor was right in rejecting such evidence.**

***Per* HARGRAVE and Sir W. MANNING, JJ.: The defendant under the covenant was bound to return the horse in absolutely good and sound order and condition, without any reference to the state the horse was in when he was first delivered to the defendant.**

This action was tried at the May sittings before Sir *W. Manning*, J., and a jury, and a verdict was given for the plaintiff with £350 damages. This was a motion on the part of the defendant to make absolute a rule *nisi* for a new trial, obtained in the second Term.

The declaration stated that the plaintiff, by deed, sold to the defendant, and the defendant, by the said deed, purchased from the plaintiff, a certain racing horse, called or known by the name of St. Heliers, and the defendant, by the said deed, covenanted to pay to the plaintiff for the purchase of the said horse the sum of £400, £50 on cash on the execution of the said deed, and £350, being the balance of the said sum of £400, on the 8th day of September, 1876, and all conditions, &c. Breach—non-payment of the sum of £350.

The defendant pleaded:—1. *Non est factum*; 2. Denial of the breach; 3. That the said deed was made subject to certain terms and conditions then agreed on by and between the plaintiff and the defendant and contained therein, that is to say, upon the terms or conditions that if at any time before the said 8th day of September, 1876, the defendant should not be satisfied with the performances of the said horse, and should be desirous of cancelling the said purchase, he should be at liberty to do so upon

(*a*) September 7.

returning the said horse in good and sound order and condition to the plaintiff, who should, notwithstanding the said return, be entitled to retain the said sum of £50, so paid on the execution of the said agreement, for his own absolute use, but should not be entitled to make any claim or demand against the defendant in respect of balance of the said purchase money. That after the making of the said deed, and before the said 8th day of September, 1876, the defendant became dissatisfied with the performances of the said horse and desirous of cancelling the said purchase, and therefore returned the said horse in good and sound order and condition to the plaintiff.

The rule *nisi* was obtained on the following grounds:—1. That his Honor rejected evidence, tendered on behalf of the defendant, of what had been done with the horse during the time the horse was in the defendant's possession. 2. That his Honor rejected evidence tendered by the defendant of the state and condition of the horse at the time of and prior to his being delivered to the defendant, such evidence being material to enable the defendant to shew that the plaintiff's witnesses must be mistaken in their evidence as to the true state and condition of the horse when they examined him. 3. That his Honor was in error in holding that the words "in good and sound order and condition" were to be construed free from any considerations as to the condition of the horse when he was first delivered by the plaintiff to the defendant, and that the defendant, in order to be entitled to return the horse under the said clause, was bound to shew that the horse when returned was absolutely in good and sound order and condition, without any reference or relation to the state the horse was in when he was so first delivered by the plaintiff to the defendant.

In the view taken by the Court, it is unnecessary to state the evidence given at the trial.

Butler, Q.C., in support of the rule, cites *Addison on Contracts*. (*b*)

Darley shews cause.

Sir JAMES MARTIN, C.J. This action was brought to recover the balance of the purchase money on the sale of a race-horse. The only issue which the jury had to decide was whether the horse was returned within the stipulated time "in good and sound order and condition." Witnesses were called on both sides to shew the condition of the horse at the time he was returned; among others the defendant, who swore that he was in good order and condition when he returned him, and also when he first received him; and he called other witnesses to the same effect. On the other side, some witnesses of very high reputation as

(*b*) p. 571; 7th ed.

veterinary surgeons gave it as their opinion that the horse was not sound at the time when he was offered back to the plaintiff. The jury had to decide between these conflicting statements.

Under these circumstances it was attempted, on behalf of the defendant, to shew that during the six months during which the horse was in the defendant's possession, nothing had been done to him, which could have brought about the damaged or unsound state in which the plaintiff's witnesses alleged that he was. Questions were put with a view of shewing what was the defendant's treatment of the horse while he was with him, in order to make the probabilities of the case stronger in favour of the defendant. The shutting out of that evidence by his Honor, who tried this case, is one of the grounds on which the new trial is moved for.

I think his Honor was right in shutting out the evidence. If it were material to shew what was done with the horse during any portion of the time that he was in the defendant's hands, it would have been material to shew the whole history of the horse during that time: how he was stabled; what food he had; what exercise he took; and many other questions of the same sort. To go at all into such inquiries would be excessively inconvenient, and would still have left untouched the main question—in what condition the horse was when he was given up; for notwithstanding the very greatest care and every precaution, disease might have come upon him and rendered him unsound. I think, therefore, that his Honor took a right view of the law in excluding this evidence. As to that ground, the rule ought to be discharged.

But then it is said that his Honor wrongly excluded evidence of the state and condition of the horse prior to and at the time of his delivery to the defendant. I do not think we are called upon to give a precise opinion on the construction of the contract, as to whether by soundness is meant absolute or only relative soundness. There is great force in what Mr. *Butler* says, that when one person entrusts a horse or any other article to another, he cannot expect that it will be returned in a better condition than when delivered; that, if unsound then, it will afterwards be delivered sound. But whether this view of the contract is reasonable or not, his Honor's ruling must be dealt with with reference to the issue before the jury. The defendant might have pleaded a special plea, to the effect that he returned the horse in as good condition as when he received him. But he does not do that; he pleads that he returned him "in good and sound order and condition." I think, having regard to the issue before the jury, and without considering the construction of the contract, that his Honor was right in holding that, upon the

pleadings, as they stood, the only question for the jury was whether the horse was sound or not at the time he was returned; and I am the more inclined to take this view because that was the way in which the defendant himself put his case to the jury. He said, and his witnesses said, that the horse was absolutely sound when he was given up. And I do not think that, consistently with the pleadings, he could have put forward any other case.

HARGRAVE, J. It is quite plain that there was evidence before the jury that the horse was not in good and sound order and condition when he was delivered back. The jury was therefore justified by the evidence in finding for the plaintiff. This case is analogous to an action on a covenant to repair in a lease. How could a tenant defending such an action give evidence that he had spent so much in paint during the lease, and so get rid of his absolute covenant to yield up the premises in good repair? So here, how could the defendant go into evidence and shew that he treated the horse well while he had him? Upon the other question, as to the state and condition of the horse at the time he was received by the defendant, I have some doubt. Suppose one man gives another a beautiful vase, with some flaw in it not noticed at the time, upon the understanding that it is to be delivered back in good order and condition. Could the owner object to take it back on the ground of the flaw? It would seem fair that he should only be entitled to have it returned in the same state as when it was lent. But, after all, what does this clause of the contract mean? The maxim of *caveat emptor* applies here. There is no representation by the vendor as to the condition of the horse when he sells him. The purchaser takes him, and by his contract engages to return him "in good and sound order and condition." Those words are absolute, and the defendant has shut himself out by his own contract. We cannot now qualify those words so as to mean "in as good order and condition as when delivered."

Sir W. MANNING, J. I think this application for a new trial should be refused. For my part, I think this agreement was not misconstrued by the defendant when he pleaded. It is suggested that a special plea might have been pleaded, setting up the return of the horse in as good condition as when he was received; but I am inclined to think that such a plea would have been demurred to, and held bad on demurrer. It seems to me that both these parties treated this horse as a sound horse, and with that view made the stipulation that he must be a sound horse when returned. I have no doubt of the real intention of these parties.

The broad question now is whether, there being evidence before the jury that the horse was absolutely sound when returned, the defendant was at liberty to go into this collateral issue, what was done with the horse while he was in the defendant's possession? I think I was right in rejecting the evidence. The defendant wanted to go into evidence of acts and circumstances spreading over no less than 202 days. Such evidence, to be good for anything, ought to deal with every single minute of that time; every groom and stable boy who had anything to do with the horse would have to be called; every detail of the daily treatment would have to be given. What a frightfully long inquiry that would be, and at best it would lead only to suppositions and suggestions; for it would have been utterly impossible to prove that the horse was never for a single moment exposed to liability to accident. Besides that, the evidence tendered was in opposition to the defendant's own case, which was that the horse was absolutely sound when returned. Another reason which influenced me at the trial, and to which I think weight ought to be given, is that this was evidence which the plaintiff could have no possible means of meeting. The defendant and persons in his employ could have given what evidence they pleased, without the plaintiff being able to contradict them in any way. I rejected the evidence because it was remote, embarrassing, and unfair to the plaintiff.

Rule discharged with costs.

Attorney for plaintiff—*W. Barker.*

Attorneys for defendant—*Holdsworth & Brown.*

TRIMBLE *v.* HILL. (*a*)

District Court Appeal—No security given.

A case on appeal from the District Court was struck out with costs upon its appearing that security had not been given.

This was an appeal from the Metropolitan District Court.

Pilcher, in support of the appeal.

Butler, Q.C., for the defendant, objects that no security has been given, and cites *Boggs* v. *Hickie.* (*b*)

PER CURIAM (*c*). Appeal case struck out with costs. (*d*)

Attorneys for plaintiff—*Gannon & McLaughlin.*

Attorney for defendant—*Driver.*

(*a*) September 12. (*b*) 2 S. C. R. 211. (*c*) Sir JAMES MARTIN, C.J., HARGRAVE and Sir W. MANNING, JJ. (*d*) An application for leave to the Prothonotary to revise his taxation of the costs under this order came before Sir *James Martin*, C.J., in Chambers, on the 19th of October, when he expressed his opinion that the defendant was entitled to the costs of the day only, and not to the general costs of the appeal.

ROCHESTER *v.* SULLIVAN AND OTHERS. (*a*)

Ecclesiastical Appeal—Executors of one will contesting subsequent will—Charges of fraud—Costs.

In considering whether the executors of a will who unsuccessfully oppose a later will are entitled to their costs out of the estate, the Court will see whether there were reasonable grounds for their opposition, and whether there was undue litigation.

It will not deprive such executors of their right to be paid their costs of unsuccessful opposition out of the estate, if in the course of the litigation charges of fraud against the parties propounding the later will are made, though such charges fail, so long as they were made *bona fide* and there were reasonable grounds of suspecting fraud or forgery. (*Per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente.*)

Per HARGRAVE, J.: Executors of a will are justified in putting the parties who propound a later will to proof in solemn form, but if they bring forward charges of fraud, which they fail to prove, they should be visited with the costs.

APPEAL from the sentence of *Hargrave*, P.J., in this cause ordering that probate of the will of Eleanor Rochester, deceased, dated the 6th of September, 1876, should be granted to the plaintiff, and that the costs of all parties up to issue joined should be paid out of the estate, and that the costs of the plaintiff after issue joined (inclusive of £3 3s. to each of the jurymen by whom the issues in the cause were tried) be paid by the defendants. The defendants appealed against the latter part of the order on the following grounds:—1. That the defendants, John Rochester Sullivan and William Smith, are the executors of a will of the said Eleanor Rochester dated the 7th of March, 1876. 2. That the said will was prepared by the solicitor of the said Eleanor Rochester, and was found by the defendants after the death of the said Eleanor Rochester, uncancelled and unaltered, in a box with a savings bank deposit book, a bank deposit slip, and valuable property. 3. That the will of the 6th September, 1876, was not produced until after the defendants had given notice in the *Government Gazette* of their intention to apply for probate of the said will of the 7th of March, 1876. 4. That the said Eleanor Rochester was a markswoman, and the said will of the 6th of September was not prepared by a solicitor, and is in the handwriting of an old servant of the said Eleanor Rochester, and contains no attestation clause. 5. That the disposition of the estate of the said Eleanor Rochester made by the said last mentioned will is not such as she had contemplated shortly before the date thereof. 6. That there were many other circumstances of suspicion which justified the defendants in requiring the plaintiff to prove the will in solemn form, and in having all the facts of the case tested by a jury. 7. That the

(*a*) September 11.

necessity for the acts of the defendants arose from the way in which the testatrix dealt with her estate and the state in which she left her testamentary papers. 8. That under all the circumstances of the case, as established by the evidence in the cause, the defendants are entitled to have the said sentence of his Honor reversed, so far as the defendants are dissatisfied therewith, and to have the costs of the parties, after issue joined, paid out of the estate of the said Eleanor Rochester.

Mrs. Rochester died at Sydney on the 24th of September, 1876. After her death a search was made among her papers, and a will was found dated the 7th of March, 1876, which had been prepared by Mr. John Martin, solicitor, and had been duly executed and attested. Two of the defendants, who were named as executors, instructed Mr. Martin to obtain probate, and the necessary advertisements were inserted. On the 4th of October an old man named Germain, who had been in the service of the testatrix, and who had been present at the search made after Mrs. Rochester's death, brought a will dated the 6th of September, 1876, and in his own handwriting, to Mr. Norton, solicitor. The will was signed with the testatrix's mark, and the names of the attesting witnesses were subscribed without any attestation clause or any statement that the will had been read over to the testatrix, before she signed it. A caveat was at once lodged by Mr. Norton against the probate of the will of the 7th of March, and the executors under the will lodged a caveat against the will of the 6th of September. A testamentary suit was then instituted, in which John Joseph Rochester, the adopted son of the testatrix, and executor and sole legatee under the will of the 6th of September, was plaintiff, and John Rochester Sullivan and William Smith, executors of the will of the 7th March, and Francis Flaherty, a beneficiary under that will, were the defendants. The sole question raised by the pleadings was the validity of the will of the 6th of September. His Honor the *Primary Judge* directed the issue of fact to be tried by a special jury of twelve. The trial took place in May last, and continued for four days, the jury finding in favour of the will. The cause then came before the *Primary Judge* for sentence, when he made the order now appealed against.

Owen, for the defendants, in support of the appeal.

Darley and *Davis*, for the plaintiff.

The following cases were cited and referred to: *Jones* v. *Godrich* (*b*); *Boughton* v. *Knight* (*c*); *Urquhart* v. *Fricker* (*d*); *Summerell* v. *Clements* (*e*); *West* v. *Goodrich* (*f*); *Harrington* v. *Bowyer* (*g*); *Orton* v. *Smith* (*h*); *Prinsep* v. *Dyce Sombre* (*i*).

(*b*) 5 Moo. P. C., 48. (*c*) L.R. 3 P. & D., 64. (*d*) 3 Add., 56. (*e*) 32 L. J. P. & M., 33. (*f*) 31 L. J. P. & M., 39. (*g*) L. R. 2 P. & D., 264. (*h*) L. R. 3 P. & D., 23. (*i*) 10 Moo. P.C., 232.

Sir JAMES MARTIN, C.J. In this case an old lady possessed of considerable property made, on the 7th of March, 1876, a will leaving her property to various persons. The will was prepared by a solicitor, and duly executed and attested. There can be no question as to the validity of that will if no subsequent will was made. Some six months afterwards the old lady died. The executors under the will of the 7th of March went to her house and made a search, and there found the will I have mentioned, which, three or four days afterwards, they proceeded to prove. In the meantime no mention was made of any other will. But ten days after the death of the testatrix, and after notice of the executors' intention to prove the will of the 7th of March had been advertised, another will was produced which bears date the 6th of September, 1876—that is, some eighteen days before the death of the testatrix. That will was not prepared by a solicitor, but by an old man upwards of 80 years of age, who had been residing for ten years in the house of the testatrix. This will was placed in the hands of Mr. Norton, solicitor, a caveat was entered against probate of the first will, and the defendants, as executors under the first will, entered a caveat against probate of the will of the 6th of September. This suit was then instituted by the executor and sole legatee under the second will against the defendants, and his Honor the *Primary Judge* directed the issue whether the will of the 6th of September was the last will of the testatrix, to be tried by a jury. After a trial the jury found in favour of that will. His Honor afterwards adopted the view of the jury, acted on it, and made a decree accordingly, directing that all the costs of the plaintiff after issue joined should be paid by the defendants. It is against that part of the order that the defendants have now appealed.

I need hardly say that we are not now trying the validity of the second will. It must be taken now for all purposes that it is a genuine will, that the verdict of the jury was right, and that his Honor's decision granting probate was right also. The only question is whether the circumstances in this case justify the defendants in coming to ask us to set aside so much of his Honor's order as directs them to pay the costs after issue joined.

We have been referred to a great number of authorities, and many passages from the evidence given at the trial have been read. I take it, with reference to this question of costs, that the first thing it is the duty of the Court to ascertain is whether the defendant who fails in his contention had fair and reasonable

grounds for that contention; not whether the decision was for or against him. It has been said in argument that the effect of the authorities is that no one who charges fraud and fails to prove his charges can get costs; the very utmost he can hope for is not to have to pay costs; and we were told that the Court would be laying down a new rule if we gave costs out of the estate to persons who had failed in sustaining charges of fraud. Now, apart from the case altogether, it is clear that persons who had an interest in seeing the first will carried out, had a right to require strict proof of a document which would most seriously affect the interests of the legatees under the will. A duty was cast upon them as trustees to make inquiry, and if, on making inquiry, circumstances appeared tending to shew fraud, it was not only within the power of the executors, but it was their duty, to have the matter tested. And what it would be reasonable to suppose, on principle, to be the law, has been actually the subject of a decision of the present Probate Judge in England, Sir *James Hannen*, in the case of *Orton* v. *Smith* (*j*). There fraud was pleaded, the defendants' case being that the signature to the will was a forgery. A most eminent expert gave evidence against the genuineness of the signature, but the Judge, on the direct evidence of the attesting witnesses, pronounced for the will. The question of costs then arose, and the learned Judge, after stating that he remained of the same opinion with reference to the merits of the case, says:—"But in dealing with the question of costs, I have to consider all the facts of the case. I understand the rule as to costs to be that if the circumstances are such as to justify the litigation, then this Court, going further than other Courts, is in the habit of allowing the party who has entered into a litigation which it considers reasonable and justifiable to have his costs out of the estate. Undoubtedly, it frequently refuses such an indulgence where the plea of fraud is improperly pleaded, but the question whether such a plea was justifiable must be judged upon its merits in each case that comes before the Court. Now in this case there were many facts calculated to excite grave suspicion. There was the fact that Mrs. King, having got the will executed, never mentioned it to the members of the family of the testator who soon afterwards came to the house. That was conduct which led to doubt and suspicion. More than that, there was the very remarkable fact, the true explanation of which remained in obscurity to the last, that, after the execution of the will, Mrs. King got a neighbour to write the testator's signature on two cheques instead of obtaining the testator's own signature to them. Although that circumstance did not go directly to the

(*j*) L. R. 3 P. & D. 23.

merits of the case, it was certainly calculated to excite grave suspicion, and the reason why the cheques were signed by some one other than the testator remained to the last in confusion and obscurity. One of the grounds on which the Court always allows costs out of the estate is that the testator has left his testamentary papers in such a state that they excite suspicion and invite litigation. Assuming that I was right in the conclusion to which I came on the merits, it was a misfortune that the mode in which the testator executed the will undoubtedly gave rise to the most natural and well founded suspicion, for the signature was evidently patched and altered." And again, at the conclusion of the judgment:—"I very much regret that the value of the estate is so small as to make this probably a barren victory for the Kings, but I must not allow that consideration to influence me in determining the question whether or not this was reasonable and proper litigation." The question here, therefore, is not whether the property which will pass to the plaintiff will be diminished, whether the costs will virtually come out of the plaintiff's pocket, but whether the parties to the litigation are not fairly entitled to be paid their costs. I am of opinion, looking to this case, supported as it is by the case of *Ireland* v. *Rendall* (*k*), that it is well established that, even where fraud is charged on reasonable grounds, the person who makes the charge is entitled to be paid his costs out of the estate. Each case had to be decided on its own merits. Now what are the merits in this case? We have not now to decide upon the facts as they appeared in evidence when the case was presented to the jury; the question is what knowledge, or means of knowledge, the defendants had at the time of the inception of these proceedings, and we cannot take into account things which they did not know till the case came on for trial. Well, what were the facts known to these defendants? I will mention a few. In the first place, this old lady had made no less than seven wills in as many years; and every one was drawn by a solicitor except the last. That was one circumstance which would put anyone interested upon inquiry. The will was drawn about eighteen days before the death of the testatrix, and was in the handwriting of this old man Germain, who was at that time a cook, but who, at an earlier period of his life, had been a first mate of a vessel, and may, therefore, be supposed to have had some education; but he had never received any legal education; and yet this will is drawn with as much skill for the purposes for which it was designed as could have been displayed by the best lawyer in the world. It is drawn with extreme skill, and the words used were the apt words to pass all the property of this old lady of whatever nature it was. That, in itself,

(*k*) L. R. I. P. & D. 194.

was a circumstance which might well excite suspicion. I know of no case where an unprofessional man has been reported to have prepared a will of this kind. Another circumstance was that the sole devisee, to whom the whole of the real and personal property of Mrs. Rochester passed by this will, was not for two years on visiting terms with the testatrix; he had been adopted by her when a boy, but had been discarded by her; and only six months before her death she made an elaborate disposition of her property and did not mention his name. There is one other circumstance which has not been mentioned in argument, but which would certainly excite suspicion in my mind; in this document, in which from first to last there is no erasure, the signature of Burke as attesting witness is in different coloured ink from the rest of the document. Independently of this, it appears that the plaintiff invited this old man to go to his house and stay with him after the old lady's death; and the defendants knew this fact, that the person who prepared the will had gone to the house of the sole devisee under it. Then the document was said to have been executed eighteen days before Mrs. Rochester's death. When the search was made after her death, the old man was there, saw the search being made, and said nothing about this will. Two days afterwards he went out with the plaintiff to his house and said nothing to him about this will, although, according to his own story, he must have known of its existence; and it was not, in fact, brought to the light of day till some time afterwards. All these circumstances, it seems to me, were amply sufficient to raise a case for inquiry, and to justify the executors of the first will in litigating the matter. It must also be remembered that the later will was not propounded first. The defendants had put forward the prior will of which they were the executors, and which had been prepared by a solicitor, and was unmistakably a genuine will. I think they were not only justified, but were bound to have this matter decided in as solemn a way as the law would allow. Under these circumstances, I am clearly of opinion that they had good and reasonable grounds for acting as they did. And we have (as I have mentioned) decided cases shewing that if they were justified in having this matter tried, they will not, by having brought forward charges of forgery and perjury which they failed to prove, be deprived of their costs. I think his Honor's order, so far as it orders the defendants to pay costs, should be varied, and that the costs of the defendants, as well after as before issue joined, should be paid out of the estate.

HARGRAVE, J. Cases of this sort have constantly come before Courts of justice. The reason I acted as I did was because of a rule of law established by over 200 years of cases, and stated in

Williams on Executors and Administrators (*l*) as follows:— "When an executor has been called upon by a next of kin to prove the will *per testes*, and has sufficiently proved it, if the party who caused him to do this merely cross-examine the witnesses produced in support of the will, he is not subject to costs, generally speaking. A case, notwithstanding, may happen in which a next of kin may exercise his undoubted right in this matter so vexatiously as to make himself responsible, if not wholly, in part, for the costs of his opponent. And there is a difference between next of kin, who are favourites of the Court, and the legatees of a former will; for though such a legatee may call for proof *per testes* of a will by which his interests under a former will are prejudiced, and may interrogate the witnesses produced in support of that will, he does this at the risk of being condemned in costs, if the Court has reason to suspect him of undue litigation." In this case both the defendants were not only executors, but were devisees under the former will, and devisees and legatees are not favourites of the Court as next of kin or heirs-at-law are. I thought in this case, not that there was no cause for inquiry—I thoroughly agree that there were circumstances to suggest inquiry, and that was why I allowed the defendants their costs up to issue joined—but that there was undue litigation.

It is said that this will was not made by an attorney, but what is there in that? It is perfectly clear that we cannot lay down the rule that a person cannot make his will himself, or get a friend to make it for him, but must apply to an attorney. It will be a terrible thing if wills are to be at the mercy of every one who chooses to attack them on such grounds. The Wills Act does not require a will to be made by an attorney; all it requires is that it should be signed by the testator and attested by two credible witnesses. Then an argument is used that the old woman would not make such a change in the disposition of her property. But we find that she was always changing her wills; and when she came nearer to her end things came up clearer before her mind, as they always do. She remembered her adopted son, for whom she had had so much affection, and she gave him all. It is the most natural will that could have been made. With regard to the words used, there is nothing but what any person of common education might put in a will. There is nothing very wonderful about this will; a lawyer might have drawn it better; for there are both omissions and superfluities. Then as to its being kept secret in a drawer; I never heard of any one who did not put away his will in the most secure place he could find. None

(*l*) p. 339; 7th ed.

of these were grounds of suspicion at all; at the most they were only sufficient to put the defendants on inquiry.

I am not prepared to make an example in this case which would set this Court up as saying, "You can go on with your witnesses, you can throw about all kinds of charges of forgery and perjury, and you will get the costs of four days' litigation out of the estate." And, after all this contest, the jury found in favour of the will without the slightest hesitation. The whole and sole argument of the defendants was that Germain, Rochester, and Burke were parties to a forgery, and had come there to perjure themselves; and this though their character was not attacked in the smallest degree, nor was their evidence even shaken on cross-examination. Then they were denounced as forgers and perjurers, and up to the very last minute of the case the charge was persisted in.

Besides all this, we should consider Flaherty's evidence. Until he was called there was not a single witness to disprove Germain's story. The jury, from the conclusion they came to, must have formed the opinion that Flaherty was a perjured witness put up against a valid will. I think every Judge is bound by the rule that there must not be undue litigation in these matters. Here there was atrocious litigation. Defendants cannot go into Court and charge three persons, against whose characters not a word can be said, with deliberate perjury and subornation of perjury. I cannot put out of my mind the way in which the trial was conducted. If parties do that which is unrighteous and wrong in litigation, they must bear the costs of the litigation.

No one but the jury or the Judge who tried the case could thoroughly appreciate the facts. We heard the evidence given and saw the demeanour of the witnesses, and both the jury and myself treated the whole defence as a "got up case." The issue to be tried was nothing but the validity of the will, and did not properly involve any question of fraud, and there was no need for the defendants to introduce it.

In analogy to cases in equity where deeds are impeached on the ground of fraud, and where the party attacking the deed, if he fails, must pay the cost of his experiment, I think that these defendants should pay the costs of unjustly attacking the validity of this will. Knowing the credibility of the attesting witnesses, and unable to break them down in any way, they chose to go on, and they went on at the risk of paying all costs subsequent to the joinder of issue. I think my order was perfectly right in every way, and that this appeal should be dismissed with costs.

Sir W. MANNING, J. I am unable to feel the slightest doubt or difficulty in concurring in the principles and conclusions

stated by his Honor the *Chief Justice*, though I cannot differ with Mr. Justice *Hargrave* as to the principles on which this case should be decided; for if I thought that there had been wicked litigation here, the parties to it ought certainly to bear their costs. The one question here is whether there has been vexatious or undue litigation.

Reason tells us, and authority confirms reason, that where there are reasonable grounds for contesting a will, the estate ought to bear the costs of the contest. A suit like the present is, in a certain sense, a kind of proceeding *in rem*—its object being to test the validity of the will. Accordingly, where those who have been given the testamentary power have resorted to tricks in drawing their wills, and where upon the will itself, or the circumstances connected with its execution, difficulties arise which make litigation necessary, the *res*—the estate which is the subject matter of the litigation—ought to bear the costs. It appears to me that that is the true rule, and that the rule contended for, viz., that a charge of fraud, under any circumstances, makes the party liable to costs, is without legal foundation. Though, where there are *reckless* charges of fraud, Courts generally visit the parties who make them with costs; yet, where on the face of the case there are fair and reasonable grounds for imputing fraud, and the person making the charge has a duty to perform, the penalty of costs will not follow. In this case it was the distinct duty of the defendants to contest the will. I cannot recognise any sound distinction between legatees under a prior will and next of kin. However, in this case we have a combination of both characters in the defendants, for, while legatees, they are really the next of kin, being persons in close relationship to the testatrix. But, though these persons were legatees, they were also executors, and when they find a later will made in favour of another person they are not bound to give way at once, but they are entitled, if not bound, to look round and inquire into all the circumstances. It is admitted that they might contest the will, but it is said that they should only put the other party to the *ex parte* proof of it. But persons testing the validity of a document are not bound to submit upon *ex parte* evidence of its genuineness, or to confine themselves to cross-examination, but are *bound* to bring forward all the evidence that can be obtained. Then how can this matter be affected by the manner in which counsel may conduct the case? Counsel on each side will probably contend rather too strongly for his client, and if counsel felt bound to put the plaintiff's case to the jury as one of forgery and perjury, he was perfectly entitled to do so, just as much as the counsel on the other side, who seems still to impute perjury to the witnesses against the will.

We have nothing whatever now to do with the evidence given at the trial, as far as the main issue is concerned. I take it that the later will is genuine, and for the purposes of the present decision I assume that the jury were right. We have only now to consider the duty of the defendants under the circumstances admitted to have existed at the time. A person is bound fairly to look at all the circumstances which come to his knowledge, and fairly to contest the will if the circumstances afford ground for thinking it invalid; but if he does it unfairly, or vexatiously, or unduly, he must pay the costs occasioned by his action. In this case I think there were abundant grounds for litigation. It is enough to shew that it was their bounden duty as trustees to put the matter into litigation, though, of course, if they afterwards suborned false witnesses, they ought undoubtedly to pay the costs. It is altogether a different matter if, as appears to have been the case here, some witnesses who had made statements in the first instance throwing doubt upon the will, afterwards turned round and proved unreliable.

This question may also be put on the ground that the testatrix's own acts have caused the litigation. If she surrounded her testamentary acts with difficulties of her own creating, then it is only fair that those who have been misled should not suffer, but should be recouped out of her estate.

I think it right to mention the grounds which to my mind justified the defendants in their action. It is a very essential feature in this case that Mrs. Rochester had made six wills, always through the intervention of an attorney, one of which was dated only six months before her death. Compare that fact with the fact that the will put forward was made without any attorney at all. I do not say that persons may not discard an attorney in favour of one in whom they have more confidence. Of course they may; but nevertheless it is a ground of suspicion. Upon the face of the document itself are things which I assume were explained to the satisfaction of the jury, but which still were sufficient to raise a suspicion of its genuineness. It is drawn without a single blot or erasure, shewing ample legal skill, and going far beyond the documents Germain drew when sent out of Court. For instance, in the documents drawn by him at the trial the words "whereso-ever and of what nature" do not occur. I think any person seeing the document would think it very odd that a will drawn by a man in Germain's position should be without erasure or blot and scientifically composed. Then there is something in the look of Burke's signature which is curious. It may be only because Burke writes more heavily than the rest of the document is written; still it is remarkable. Then the will of the 7th of March was

found in a box in Mrs. Rochester's room with her valuables, and no other will was produced, or found by the defendants, though they appear to have searched. Ten days afterwards another will is brought forward, of which not one word was said, though Germain was present when they were searching. Perhaps he was told to keep it secret; still, would not his conduct be suspicious? There is an absence of the usual attestation clause and the statement that the will was read over to the testatrix before she made her mark. That is well known to be the usual course in such cases. It must also be remembered that as the testatrix was a markswoman, the defendants had not the opportunity of judging of the genuineness of the will by her handwriting. Then there is the great improbability of this Mrs. Rochester, after having by a former will given the bulk of her property to charitable uses, going back on the verge of death. It is not likely that six months before she would think of her church, and then change her mind afterwards. That was a thing which might very well be considered by these defendants to raise a fair and reasonable doubt whether the will were genuine. There are other circumstances, for instance, Cadwell's first statement, which would enormously strengthen their doubts and suspicions.

To say, under all these circumstances, that the defendants are to pay the costs of this fair and reasonable litigation, would be, in my opinion, to punish them for a virtue rather than an offence.

Order of Primary Judge, so far as it directs that the costs of the plaintiff after issue joined be paid by the defendants, reversed. The costs of all parties, including costs of the appeal, to be paid out of the estate of the testatrix.

Attorney for plaintiff—*Norton.*

Attorney for defendants—*Martin.*

RE HASLINGDEN—EX PARTE MANBY. (a)

Attorneys Act (11 *Vic., No.* 33), *s.* 13—*Irrelevant matter in affidavits—Costs.*

The 13th section of the Attorneys Act is intended to prevent persons from setting themselves up as attorneys, not from drawing agreements incidentally in the course of their ordinary business.

Irrelevant charges being made in the applicant's affidavits, the Court, on dismissing an application to punish H. for contempt, made the applicant pay the costs, though there was a *primâ facie* case against H.

This was a motion to make absolute a rule calling one one Haslingden to shew cause why he should not be deemed guilty of contempt of Court, and punished accordingly upon the ground

(a) September 21.

that he did for, or in expectation of, fee, gain, or reward draw or prepare an instrument in writing relating to real estate, not being, &c.

The Act 11 Vic., No. 33, s. 13, is in the following terms:— "Every person who shall, for, or in expectation of, any fee, gain, or reward, directly or indirectly, draw or prepare any conveyance, or other deed or instrument in writing relating to any real estate, or any proceedings in law or equity (other than and except barristers, or attorneys, or solicitors of the Supreme Court, or certificated conveyancers as hereinafter mentioned, and other than and except persons solely employed to engross any deed, instrument, or other proceeding not drawn or prepared by themselves and for their own account respectively, and other than and except public officers drawing or preparing official instruments applicable to their respective offices and in the course of their duty) shall be deemed guilty of a contempt of the Supreme Court, and shall and may be punished accordingly for every such offence upon the application of any person complaining thereof, or shall for every such offence forfeit and pay the sum of £20, to be sued for and recovered in a summary way before any two or more Justices of the Peace, &c.

From the affidavits it appeared that Haslingden, whose business was that of an auctioneer and commission agent, had been employed to find, and found, a tenant for certain premises belonging to one Behl. The following account was furnished:—

To letting and preparing agreement	£2	2s.	0d.
Advertising horses...		12s.	6d.
	£2	14s.	6d.

Haslingden, in his affidavit filed in answer to those upon which the rule was obtained, denied that the payment of £2 2s. was for anything else than obtaining a tenant, and stated that the account "was drawn up hurriedly without any consideration, and the mention of the words 'preparing agreement' was a clerical error, and ought not to have been mentioned." He also stated that, in order to expedite the settlement of the transaction, he drew up a memorandum of agreement embodying the terms and duration of the tenancy. "After the said memorandum had been signed, I submitted to the said Philip Behl that he ought to give me another half guinea, in addition to the two guineas which he had promised me, for my extra trouble in drawing the said memorandum; he, however, declined to do so, and paid me only the two guineas agreed upon in the first instance." The affidavit of Mr. Edward Manby, the applicant, not only set out the account rendered to Behl, but alleged misconduct of Haslingden in other

similar transactions, and particularly a failure to insure the premises which were the subject of the lease in question. The affidavits on both sides dealt with the merits of a case in the Small Debts Court at Bega, between Manby and Haslingden, in no way connected with the present application, and set forth various matters shewing considerable ill-feeling between these parties.

Want, in support of the rule.

Darley shews cause.

Sir JAMES MARTIN, C.J. The only doubt we have had in this case is whether we ought to make Mr. Manby pay the costs of this application. By the Act 11 Vic., No. 33, s. 13, power is given to this Court to deal summarily with infringement of that Act as contempt of Court; but before the Court is justified in exercising that summary power, a very strong case ought to be made out. What the Legislature intended was to prevent unauthorised persons from setting up and acting as attorneys, not from drawing any agreement relating to real property incidentally, in the course of their ordinary and legitimate business. However, looking to the admissions of the respondent in this case, and to the fact that his own receipt gave some ground for the suspicion that he was infringing the law, if this had been a simple application, without anything extraneous being imported into the case, we should not have saddled the applicant with costs. But the affidavits are full of matter which is irrelevant and, upon such an application, in the highest degree impertinent, and the greatest possible amount of ill-feeling has been shewn. Under the circumstances, the rule should be discharged with costs.

HARGRAVE, J., and FAUCETT, J., concurred.

Rule discharged with costs.

Attorney for applicant—*F. Curtiss.*

Attorney for respondent—*Brennan.*

MARTIN *v.* BAKER. (*a*)

Crown Lands Alienation Act of 1861, *ss.* 13, 18, 19—*Mineral Conditional Purchase—Sufficiency of Description—Forfeiture.*

The plaintiff, with others, lodged an application for a mineral conditional purchase, under s. 19 of the Crown Lands Alienation Act of 1861, of lands described as follows:—"County of Bathurst, parish of Bracebridge, 40 acres, about one mile E. of road from Spring Vale to James Park, and about a mile in a S. direction from Markham and West's copper lease, to be taken as marked by applicants." Certain land not in the parish mentioned, and to the N. of Markham and West's copper lease, was marked by the applicants, and was being worked by them at the time of the application.

(*a*) August 30.

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*), that without the words "to be taken as marked," the description was void for uncertainty, but that with these words it was capable of being rendered certain, and that the Judge was justified in leaving the question of identification to the jury.

Per HARGRAVE, J.: The description, without the words referring to the marking, was in sufficient compliance with the requirements of s. 13.

Held, also, that the words "to be taken as marked" controlled the inconsistent words of the description.

After the plaintiff's application, a mineral lease of the same land was granted to the defendant, who ejected the plaintiff. Before the expiration of three years from the date of the application, the plaintiff went to the office of the Minister for Lands and was told by a clerk there that it was useless to tender the balance of the purchase money. The plaintiff consequently did not pay it into the Treasury. In an action of ejectment brought by the plaintiff against the defendant it was objected that the land had reverted to the Crown under s. 18 upon the default of the plaintiff in payment of the balance.

Held, that the plaintiff was entitled to maintain ejectment, because (1) (*per* TOTAM CURIAM) the land does not revert under s. 18 until the Crown has made a declaration of forfeiture; (2) (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.) because the Crown had dispensed with the tender of the balance by wrongfully issuing a lease and repudiating the plaintiff's title, and by the statement of the officer in the Lands Department that a tender would be useless.

EJECTMENT. The writ claimed a portion of land containing 40 acres and situate in the parish of Dunleary, county of Bathurst.

On the 3rd of September, 1872, Thorn and others, under whom the defendant claimed, applied for a mineral lease of 40 acres of land described as "situated on a hill at the back of the Bald Hill, near the head of Markham's Creek, and in close proximity to a mineral lease applied for recently by Messrs. Jordan, West, and Ash." On the 14th of September the plaintiff and others marked the portion of land described in the writ, and on the 19th of September lodged an application for a mineral conditional purchase, describing the land as follows:—County of Bathurst, parish of Bracebridge, 40 acres, about one mile east of the road from Spring Vale to James Park, and about a mile in a southerly direction from Markham and West's copper lease. To be taken as marked by applicants." The plaintiff and his party then sank a shaft on the land, and commenced working for copper. Thorn and party afterwards made a claim to the land occupied and being worked by plaintiff and party, on the ground that it was included in their application of the 3rd of September. The Minister for Lands decided that Thorn and party were entitled to the land in dispute, and a lease was issued to them. They forcibly ejected the plaintiff and party, and continued to work the property. Before the expiration of three years from the date of the plaintiff's application, he asked at the Lands Office in Sydney whether it was necessary to pay the balance of the purchase

money, and was told by some officer there that it was not necessary, as the matter was in dispute. At the trial it appeared that the land taken up by the plaintiff was northerly, and not southerly, of Markham and West's copper lease, and that the distances were not accurately stated in the description. Evidence was given to shew that the land taken up by Thorn and party under their application for a lease was in a different situation altogether. The jury found a verdict for the plaintiff.

A rule *nisi* to enter a nonsuit or for a new trial was obtained by Sir *George Innes* in June last on the following grounds:—1. That the description in the plaintiff's application to conditionally purchase was void for uncertainty. 2. That the plaintiff's application stating that the ground applied for was southerly of Markham and West's land, the applicant could not shew title to land northerly of Markham and West's. 3. That the Minister for Lands could not, under the circumstances proved, or under any circumstances, amend the application of plaintiff's party by the substitution of the word "northerly" for "southerly." 4. That the alleged marking on the ground of land northerly of Markham and West's could not give a title to the land in dispute, the plaintiff's title depending on his application and the description therein, which was of land in a totally different place to that alleged to have been marked. 5. That the plaintiff having paid no more than the deposit upon his conditional purchase, and the period prescribed by the Act for the payment of the balance having expired without any payment of such balance or interest, the land reverted to the Crown, and the plaintiff's title ceased and was entirely gone, and the plaintiff consequently could not recover in this action.

Butler, Q.C., *Darley*, Sir *George Innes*, and *Davis*, in support of the rule. The only question can be whether the words "to be taken as marked by applicant" save the description from being void for uncertainty. By itself the description is clearly bad. We submit the latter words make no difference. The rule is that the acts done may explain the words where there is nothing repugnant or inconsistent, but that they cannot control or contradict the written description. We do not contend against the rule of *falsa demonstratio*, but we merely say that when land is marked which does not fit in with the description, it is the same as if the description was partly applicable to one, partly to another piece of land. In that case it would be void for repugnancy. If the land "marked by the applicants" were set out by metes and bounds in the description, it would be clearly inconsistent with the rest of the description. But in any case the description is insufficient. What guide is it to anyone to be told that the land

taken up is what is "marked by the applicants." To fix the position in this way is against the policy of the Act altogether. Common accuracy is required in describing the land. Then as to the power of the Minister for Lands to amend the description. No such power is given by the Crown Lands Act: *Emery* v. *Barclay* (*b*). There ought to have been a new application altogether; otherwise the Minister could amend or not as he pleased. In the case of a mineral selection, the selector has no title at all after the expiration of the three years unless he has a grant. This is a very different case from *Mate* v. *Nugent* (*c*). In that case three years had not expired; and besides, this argument does not apply to a conditional purchaser under the 13th section. He may postpone the payment of the balance of the purchase money by paying interest. But a conditional purchaser under section 19 is in a different position. [Sir W. MANNING, J.: Does your argument go to the length that if the balance of the purchase money is paid into the Treasury, the conditional purchaser is not entitled to sue until he has the grant?] Yes; but it is not necessary to go so far, because in this case he neither paid nor tendered the balance. Not having the grant, he had not the legal estate, and could not maintain ejectment, especially against the defendant, who has a lease from the Crown. [Sir W. MANNING, J.: Would not a promisee of a grant be able to maintain ejectment?] Not if he shews the legal estate to be outstanding in the Crown. If he merely relied upon possession he might succeed; but he must fail if he proved the promise, without shewing that it was followed by a grant. Besides, in this case, through the plaintiff's failure to pay the balance of the purchase money at the end of three years, the land has reverted to the Crown. [Sir JAMES MARTIN, C.J.: Can a third person take advantage of that?] Certainly; a *jus tertii* can always be set up as a defence in an action of ejectment. [Sir JAMES MARTIN, C.J.: Does not *Doe* v. *Dyeball* (*d*) shew that a mere possessor may maintain ejectment against a wrong-doer who has turned him out, without shewing title?] Yes, if he relies upon possession alone, but if in the course of the trial it appears, either from the plaintiff's or the defendant's case, that the legal title is outstanding in some one else, the plaintiff cannot succeed: *Doe* v. *Horne* (*e*). *Doe* v. *Barnard* (*f*) is another clear authority. A plaintiff has often been defeated in an ejectment by an outstanding term. Here the title has been shewn to be in the Crown. The words of the 18th section are: "On default of a compliance with the requirements of this section, the land shall revert to Her Majesty, and be liable to be sold at auction,

(*b*) 8 S.C.R. 374. (*c*) 8 S C.R. 246. (*d*) 3 C. & P. 610; M. & M. 346.
(*e*) 3 M. & W. 333. (*f*) 13 Q.B. 945.

and the deposit shall be forfeited." "Revert" is a common legal word, and there is nothing to prevent its having its usual signification. It implies a determination of the estate, not at the will of any party, but by operation of law. The Minister cannot prevent such a forfeiture, nor is any declaration by him required to bring it about. The words in the 20th section are altogether different: "Shall be declared forfeited." That is not nearly so strong as "shall revert." A statutory forfeiture cannot be waived. The rule is stated in *Sedgwick on the Construction of Statutes* (*g*), as follows: "A forfeiture at common law does not operate to change the property until some legal step has been taken by the Government for the assertion of its rights; but where a forfeiture is given by statute, the rules of the common law are dispensed with, and the thing forfeited may either vest immediately or upon the performance of some future act, according to the will of the Legislature; and if no future time or future act is pointed out, then where, by the words of a statute, a forfeiture is attached to the commission of an offence, its immediate operation is to divest wholly the title of the owner, so as to deprive him of the right of maintaining any action or defence to which, as owner, he could otherwise be entitled." [HARGRAVE, J.: There is no offence committed here; there is nothing more than an omission. Is not the Crown in the position of a landlord, with power to waive any forfeitures?] No; the Crown ceased to be landlord upon the passing of the Crown Lands Acts. The Crown is now only in the position of a bare trustee, with the duty of carrying out the Act of Parliament. Under section 20, a discretion is left to the Governor and Executive Council, which is analogous to a landlord's discretion, but there is nothing of the sort in this section. We say that the plaintiff never acquired any title, because the description in his application was not in accordance with the requirements of the Crown Lands Alienation Act; but if he had any title, that title ceased upon his failure to pay the balance of the purchase money at the expiration of three years; and further, that if his title to the land continued, still, not having received a grant, he had not the legal estate, and could not maintain ejectment.

M. H. Stephen and *Cooper*, for the plaintiff, shew cause. There is no better way of applying for a conditional purchase than to refer to markings on the ground. So long as the land applied for can be identified, that is sufficient. And the words "to be taken as marked" are controlling words, and cannot be rejected. In *Magee* v. *Lavell* (*h*) it was held that the words "he now occupies" formed an essential part of the description of the subject matter

(*g*) p. 78; 2nd ed. (*h*) L.R. 9 C.P. 170.

of the agreement, and could not be rejected as *falsa demonstratio*. The Court will read the whole of this description, so as to make it good if possible. The next argument on the other side is that even if the description is sufficient, and even supposing that the land had not reverted to the Crown, yet after the expiration of three years we cannot bring this action without obtaining a grant. This Court has several times decided that conditional purchasers acquire, immediately upon application and payment of deposit, a statutory or parliamentary title, and that by virtue of that title they can maintain ejectment. If the conditional purchaser has that title for three years, how can the mere non-issue of a grant at the end of that time affect it? If he could maintain ejectment before without a grant, why not afterwards? His parliamentary title cannot be divested except by forfeiture, certainly not by the failure to obtain a grant which he is under no obligation to ask for. And what is the use of a grant to a conditional purchaser? It is only useful as evidence of his statutory title. He takes his title, not by the deed, but under the Act of Parliament. In *Chisholm* v. *Macauley* (*i*), *Hargrave*, J., says: "It necessarily follows that, until grant issued, the free selector's estate cannot be separated into legal and equitable fee." The Court pointed out, when the rule *nisi* was granted, a difficulty in the way of the defendant's argument that this land had been forfeited. It has been assumed on the other side that the 18th section has been incorporated with the 19th. Now s. 19 refers to s. 13, but not to s. 18 at all, and imposes conditions different from those on which an ordinary conditional purchase is held. The proviso in s. 18 only operates in the event of a non-compliance with the requirements of *that* section, and makes no reference to s. 19. The two sections deal with different kinds of property, and cannot be considered as incorporated. In *W. Joachim* v. *O'Shanassy*, *Hargrave*, J., says (*j*): "Not only was no authority cited at the bar, but no authority can be cited for thus commingling all the 13th, 16th, 17th, and 18th sections together, and applying the terms of the latter sections to the original selection already made under the 13th section. . . I think, also, it will be found that such a commingling of four sections of one Act of Parliament together into one construction is entirely without precedent or justification." And Sir *W. Manning*, J., says (*k*): "I cannot accept the proposed association of the 13th and 17th sections in the sense of creating a peremptory obligation to observe the regulations of the latter in the original applications on pain of total invalidity." There is, therefore, a decision of this Court against incorporating these sections together. But, even if the 18th section

(*i*) 7 S. C. R. 333, n. (*j*) *ante*, p. 108. (*k*) *ante*, p. 115.

is incorporated, the forfeiture is not absolute. There is no distinction between the words "shall revert" and "shall be forfeited." Sir *A. Stephen*, C.J., in *Drinkwater* v. *Arthur* (*l*), says: "The meaning in each clause, though the phraseology is varied, must certainly be the same." In *Chappel* v. *Samper* (*m*) it was held that non-compliance with the regulations under the Gold Fields Act of 1866 did not, *ipso facto*, work a forfeiture, but that some act of the Crown evidencing its intention of exercising the right to forfeit was necessary. There it was argued that the Crown could not waive a statutory forfeiture, but the Court took a different view. But the plaintiff is not in default here. Having been turned out by the act of the Crown, he could not be expected either to pay or tender the balance of the purchase money. The Crown virtually dispensed with any tender. *Carr* v. *Montefiore* (*n*) and *Lyle* v. *Richards* (*o*) were also referred to.

Butler, Q.C., in reply.

Sir JAMES MARTIN, C.J. This is an action of ejectment brought to recover 40 acres of land under the following circumstances. In the year 1872, in the early part of September, the plaintiff, associated with three other persons, went on the land claimed in this action and marked a tree with the letters T. N., as a centre mark, and marked other trees along the boundaries. They also put up a notice warning other people off the land, and began to mine upon it for copper. This, according to the evidence, took place on the 14th September. On the 19th September, one of the party went to the local land agent and lodged with him a written application in these terms: [His Honor read the application]. Now the powers under which this application was made are set forth in the 13th and 19th sections of the Crown Lands Alienation Act of 1861. The 13th section, which is very well known, gives the right to what is popularly termed free-select, by tendering to the land agent a written application and paying a deposit of 5s. per acre. The 19th section does not expressly re-enact the same terms with reference to mineral conditional purchases, but refers to section 13 in the following terms:— "Crown lands may be conditionally selected for the purposes of mining other than gold-mining under section 13 of this Act, except that in such case the price shall be 40s. per acre, and except that in such case, instead of the conditions applicable to other cases in regard to the declaration and certificate required, a declaration shall be required only of the fact that not less than an average sum of £2 per acre has been expended in mining operations other than gold mining on the land." Looking at the two

(*l*) 10 S.C.R. 29 a. (*m*) 11 S.C.R. 138. (*n*) 5 B. and S. 408.
(*o*) L.R. 1 E. & I. App. 222.

sections together, it is plain that an application for a mineral conditional purchase should be in writing, and it is clearly essential that the thing which is intended to be applied for must be described, either by metes and bounds, or with reference to something by which the metes and bounds may be ascertained. The most accurate way to describe land is by metes and bounds; still there is no doubt that, even for the purposes of a conveyance, land may be described by its name, if that name is well known. Such a description is as good in every way as one by metes and bounds. All that is essential is that the thing conveyed, or granted, or applied for, is capable of being identified. It may either be described by the name it has acquired by usage, or by regular metes and bounds, or by reference to natural features or marks upon the ground, by which the required boundaries may be ascertained.

If, in the present case, the application of the plaintiff's party does not contain particulars which would enable one to ascertain what was applied for, it is of no use, because it must be certain. Now the first part of the description is: "County of Bathurst, parish of Bracebridge, 40 acres, about one mile E. of the road from Spring Vale to James Park, and about a mile in a southerly direction from Markham and West's copper lease." There can be no doubt that, as a description, that is utterly worthless. It speaks of "about a mile," without mentioning any fixed point, or giving the direction or the length of one of the boundary lines, and is of no use whatever, because it might fit equally well any number of pieces of 40 acres in that parish and county and about the position specified. But then there are these words: "To be taken as marked by applicants." Now we have evidence that this particular piece of land was marked in such a way as to make it easy of identification. Trees were marked at the corners in a remarkable way, being blazed on four sides. It appears that prior to the application these people, or some of them, were on this ground with the centre tree marked, with trees marked at the corners, and with a notice put up warning people off. That would be significant in this way. It does not follow that a person seeing trees blazed would know that these persons had marked them, and the marking alone would probably not have been enough to identify the land; but the fact that these people were actually at this time on the ground marked in this way, working it, and claiming it as theirs, would be evidence of what they meant when they spoke of the ground applied for as marked by them. The evidence would be of more or less value according to circumstances, but its value was a question for the jury. The identification of land is always a matter for the jury. If the jury decide

altogether without sufficient evidence, the Judges may direct another inquiry before another jury, but it remains a question of fact for the jury to decide. Here the jury must be taken to have found that the land in question in the action was the land marked by the plaintiff's party; and it was a matter for them to find.

But it is said that the land so marked was not southerly, but northerly, of Markham and West's land; and that although it may be granted that a vagueness of the description may be helped by the marking, still the marking could not be sufficient to attach the application to land in a different direction altogether. A forcible illustration is given. Suppose land applied for on the N. bank of a river, with reference to markings, and the applicant marks land on the S. bank. Still, all these are questions of identification. If, indeed, the applicants had marked other pieces of land, and made it impossible for any one to know to which piece of land the description was intended to apply, the jury would not have been justified in fixing the position of the land applied for. But here there is no evidence of any other marking by the applicants anywhere else; and if the land marked was at all in the neighbourhood indicated by the application, it appears to me that the jury were at liberty to find that the land applied for was capable of identification. I think, therefore, that the application by the plaintiff's party was, under the circumstances, a sufficient application.

It went in on the 19th of September. On the 2nd of September the persons under the defendant's claim lodged an application for a mineral lease of land described as follows:—"40 acres situated on a hill at the back of the Bald Hill, near the head of Markham's Creek, and in close proximity to a mineral lease applied for recently by Messrs. Jordan, West, and Ash." According to the view I take of this case, it is unnecessary for me to say whether that was a sufficient description, but in my opinion it was insufficient. On a hill—at the back of another hill—near the head of a creek—all this is altogether too vague for a description, and is not helped by the succeeding words "in close proximity to" a certain mineral lease. That is not very definite, as it might be to the N., S., E., or W. of it. Such a description would be far too vague for the purposes of a grant from the Crown or a conveyance. But this question is unimportant, because, if the plaintiff is right, his right will depend on the validity of his own application, and also because the jury must be taken to have found that the description of the 2nd of September does not touch the land in question here.

It appears that after the plaintiff's application was sent in, the land was found to be valuable, and representations were made to

the Government by both parties. The upshot was that the Minister decided that the right to this land was in Thorn and Company, and thereupon a mineral lease issued to them on the 17th of March, 1873. Armed with this document, Thorn and party went to the land and, with some slight degree of force, turned the plaintiff's party out, and have remained there ever since. The plaintiff has brought this action, and is now met with the objections that the description in his application was void for uncertainty, that he could not claim ground to the north of Markham and West's, as he applied for land to the south, and that the Minister for Lands could not amend the application. It will have been gathered from the opinions I have already expressed, that none of these grounds of objection are good. The question whether the Minister for Lands could amend or not becomes immaterial if there was nothing that required amendment. But there still remains a further question whether the plaintiff, not having paid or tendered the balance of the purchase money, is in a position to maintain an action of ejectment at all. By the Act to which I have already referred, if every condition of section 13, except those specially excepted, is imported into section 19, then it follows that at the expiration of three years from the date of the purchase the balance of the purchase money, with the declaration required by the Act, should be tendered by the conditional purchaser to the Crown. I am disposed to think, with the defendant's counsel, that these conditions are all imported. One of the conditions is that if a selector fails to comply with the requirements of section 18, the land shall be forfeited. It follows upon section 13, and, I think, must be taken as incorporated in section 19. If it were not so, the Crown would have no power to turn a person out of a mineral selection if he did not pay the balance. That cannot be what the Legislature intended. The question then is whether, no tender of the balance having been made, and the time having expired, the plaintiff is entitled to bring an action. I think he is. In my opinion, some action ought to be taken by the Crown before a forfeiture is complete; and this opinion has been frequently expressed in this Court in cases under the 13th section. Here there never was any declaration of forfeiture, and whatever right the plaintiff originally had remained intact up to the time of the defendant going into possession. But it is said that the Crown has issued a lease of this very land to the defendant. Before the Crown Lands Acts such a lease would have been conclusive in the defendant's favour, but now the Crown has only limited powers. A lease can only be granted on certain preliminary steps being taken. When they have been taken, there is a right to demand a lease from the

Crown. But if a lease is issued by the Crown, these preliminaries not having been complied with, it is of no value whatever. I think, therefore, that the fact of the defendant having a lease does not affect the plaintiff at all. Even if it were valid it could not take the land out of the plaintiff after he had made a valid selection, any more than a Crown grant (as was held in *Mate* v. *Nugent*).

I think further that the plaintiff was not bound to make any tender at all, the Crown having repudiated his title, and dispensed with the necessity of a tender. There is also evidence that the plaintiff was told by an officer at the Lands Office that it was useless to pay the balance. On the grounds that the plaintiff was told by the clerk not to pay the money, that the Crown wrongfully issued a lease of the plaintiff's land, and that there has been no declaration of forfeiture, I think that the plaintiff is entitled to the possession of this land and entitled to maintain this action.

HARGRAVE, J. I concur with his Honor the *Chief Justice* that this rule ought to be discharged. But I altogether differ from his Honor as to the sufficiency of the description. There is not the slightest ambiguity on the face of it. The quantity—40 acres —is given; and it specifies the county and parish. That would be quite enough in any will or deed, and it is quite sufficient in an application under section 13. It complies with every requirement of that section. All a selector has to do is to send in a "written application for the conditional purchase of any such lands." He says: "I desire to take up 40 acres in such a neighbourhood;" and then he may go upon any 40 acres that will come within the description, within a month. It is the occupation which fixes the position of the land he takes up. If there is any ambiguity in the application at all, it is a latent ambiguity which does not touch the validity of the application. Then the rule of law is plain that in every legal document applicable to two or three subject matters, the latent ambiguity, raised by facts, may be dissipated by facts. But here there is no ambiguity at all. Not only are the county and parish mentioned, but the land is described as east of a particular road, and the distance is given—another element of certainty; and it is described as south of a mineral lease. There is not the slightest ambiguity either latent or patent. The words "as marked by the applicants" add, of course, to the certainty of the description, but, in my opinion, add unnecessarily.

There is a well-known maxim—"*Benignæ faciendæ sunt interpretationes propter simplicitatem laicorum.*" The rule is perfectly elementary that anything drawn by laymen, such as an application

of this kind, shall be liberally construed. Why are we to destroy selections all over the country because the selectors do not do what it is much more the place of the Government to do afterwards—accurately mark out their selections by metes and bounds? This is an old maxim, to be found in *Coke upon Littleton*, and from *Coke's* time has regulated the construction of all our deeds and wills.

Another maxim is—"*Certum est quod certum reddi potest.*" It is one of *Noy's Maxims*, and for the last 200 years has been of every day application to leases and conveyances. It is a rule that affects the title to property of all kinds throughout the colony.

Then, again, there is the other maxim—"*Falsa demonstratio non nocet*," which Mr. Broom translates, "Mere false description does not make an instrument inoperative." And what is there here more than false description at the most? If we held this application to be void, we should be scouting all these rules which have been the law of England for centuries, and shaking the titles not only of free selectors, but of all holders of land. I agree that it is quite immaterial whether the Minister amended or not; the insertion of "southerly" for "northerly" was mere "false demonstration," and could not invalidate the application.

The first point in all cases of this kind is the effect of those important words in the Crown Lands Alienation Act, "and not otherwise." They are the great protection of the people of this country against the tyranny of a Minister. It is necessary for carrying out the Act that power should be given to the Minister, and the provision that lands shall be granted under and subject to the provisions of the Act and "not otherwise" is essential for the protection of every title. Here the defendant takes "otherwise," for he takes after the plaintiff has made a valid selection. It does not matter whether he has a lease from the Crown, if it is granted "otherwise" than in accordance with the Crown Lands Acts, and he takes at his own risk; and if he chooses to expend £30,000 in mining on the land, he does it at his own risk. It is most important that we should keep strictly to the one rule in the construction of all titles under these Acts.

The other point is about forfeiture. This Court has always held, from *Drinkwater* v. *Arthur* to the present time, that if the Government, as the landlord of the Crown lands, does not declare a forfeiture, the land is not forfeited. There must be an express declaration by the Government. It is not enough for the Government to let or grant the land to some one else, and it is of the utmost importance to maintain the rule that, where a person takes land from the Government, to which some other person has

had a right, he must suffer for not having had unforfeited titles cleared off before he purchased. It is exactly the same case as *Mate* v. *Nugent*, and that decision has been the law of this Court for the last eight years. I think the rule ought to be discharged with costs.

Sir W. MANNING, J. On some minor points I cannot quite express concurrence with their Honors. On the question of the description I agree with the *Chief Justice*, but differ from Mr. Justice *Hargrave*. I think the description would be insufficient if it were not for the words "to be taken as marked." The question now is whether the description, unless fitted to a piece of land by subsequent acts, would be sufficient in an action of ejectment. If no other description were inserted in the writ, it appears to me that the plaintiff could not succeed, for it could not be said that there was any one particular portion of 40 acres which that description represented. But I am not at all disposed to say that these words would not be sufficient, if the only question lay between the Crown and the applicant—if no adverse right intervened. But that is not the position of things now. Here an action of ejectment has been brought against an adverse claimant. And the vagueness of the description would not be the only objection, for there is the word "southerly," and it would be impossible, on the mere description, without the words of reference, to maintain ejectment for land northerly of Markham and West's land. But the concluding words alter the whole aspect of the case. They are clearly the dominant words, and, together with the evidence of actual marking, supplied quite sufficient materials to go to the jury—and that is all the Judge has to say. Reading the description in the light of the rule of *falsa demonstratio*, it is a very simple matter. Take the word "southerly." How often, in my experience, even in deeds of grant, do we meet with lines described as E. which ought to be W., or N. instead of S.? Who ever thinks such inaccuracies of any importance, if the rest of the description supply materials for rectifying the error? Following out the observations of his Honor the *Chief Justice*, I think that the words "to be taken as marked by applicants" are much stronger from the fact that the land, at the time the application was made, was in the actual occupation of the plaintiff's party. Besides, I find that the land was applied for "for purposes of mining other than gold-mining," and at that very time the plaintiff and his companions were prospecting for copper. I think that the distinctness and definiteness of the description was quite sufficient to leave to the jury.

Other parts of the description—such as the distances, &c.—were relied upon as being repugnant. These are matters of very

little consequence under the circumstances. This land was taken up in a mountainous, rough country, in which it is very difficult to estimate distances. What would be only a mile by the usual track going round a hill, might, if you went in a straight line over the top of the hill, be a mile and a half. So that when it is stated that the distance from the road is a mile, it is necessary to inquire which way they went. Then we must consider the haste with which these pieces of land were marked in order to prevent discovery. Under all the circumstances, it seems to me that a rough description was quite sufficient, and that all these discrepancies were controlled by the dominant words and the fact of working. The only question now for us is, whether I was right in putting the fact of marking to the jury as material.

We have nothing to do now with the defendant's application. It is not definite at all. It is impossible to fix the distances; and there is no reference to marks, and nothing to entitle us to look either to the marking or the occupation. The jury found that the land applied for by the defendant was not the land claimed in the action, and I think they were right. The description is too indefinite to fix it anywhere; or, if it can be fixed by marks, then the evidence shews that it was not the same land.

It is said that the plaintiff is not entitled to bring his action now. I clearly think he can bring it now, and that he might have done so in 1873; but, unfortunately, he was not then advised of his legal rights, and thought his only remedy was an appeal to the Legislature. We are not now in a Court of equity, inquiring whether the plaintiff stood by and saw the land being improved by the defendant. But one thing is quite clear—that the plaintiff never gave up his right, but made continual claim. If the defendant, knowing of this claim, chose to make improvements, he did so at his own risk.

The last question is whether default in payment of the balance of the purchase money is a bar to this action. I do not think that the Crown Lands Alienation Act has the effect of introducing section 18 with section 13 into section 19. The 19th section enacts that "Crown lands may be conditionally selected for the purposes of mining other than gold-mining under section 13 of this Act, except that in such case the price shall be 40s. per acre, and except that in such case, instead of the conditions applicable to other cases in regard to the declaration and certificate required, a declaration shall be required only of the fact that not less than an average sum of £2 per acre has been expended in mining operations other than gold-mining on the land. And upon such conditions being satisfied as hereby altered, &c." The question then arises whether a mineral selection, being subject to the

conditions of an ordinary conditional purchase, is also subject to forfeiture for failure of these conditions. I am disposed to think that forfeiture might be attached to a failure to comply with the conditions, as otherwise there might be no way to compel their fulfilment. But what are the conditions "in regard to the declaration and certificate?" They are given in s. 18; but the other condition in that section, as to the payment of the balance of the purchase money, is not mentioned in section 19, which speaks only of the conditions applicable in regard to the declaration and certificate. We cannot drag by main force a proviso for forfeiture into a clause in which it does not occur, and in which the section containing it is not expressly incorporated. Nor is the condition, to the breach of which the forfeiture is annexed, mentioned in the 19th section. But suppose that the reference to section 13 does have the effect of incorporating the 18th section in a triangular way—I do not agree that it has that effect—but suppose it has; then what are the words of section 18? "On default of a compliance with the requirements of this section the land shall revert to Her Majesty and be liable to be sold at auction, and the deposit shall be forfeited." These words raise two questions—first, what is default? secondly, what is reverter? In this case there was no default, as I understand the terms of the section. Although it is true that the lease subsequently issued was good for nothing, because another person was the rightful owner at the time; and although the act of the Crown in issuing it was a nullity, it is quite impossible for the Crown to say now that the plaintiff has committed default, when the Crown, although illegally and voidly, has done what led to his being turned out of possession. Take the condition of improvements. How could the plaintiff have been expected to lay out money in improvements? Suppose he had not expended the necessary amount during the time he was in possession, could the land have been afterwards forfeited for non-compliance with that condition? And the same argument applies to the condition requiring the payment of the balance. To say that the plaintiff was bound to pay money under these circumstances is perfectly idle and preposterous. There was, therefore, no default on his part. But there is the further fact of his going to the office and making inquiries from a clerk. Surely that was sufficient. Was he bound to force his way up to the Minister for Lands, or go to the Colonial Treasurer and actually tender the money? Upon a question of default entailing forfeiture we ought to take a wide and liberal view of the circumstances which establish or negative compliance.

As I am of opinion that there was no default, it is not necessary to decide the effect of the word "revert"; but as the point has

been raised, I may express my concurrence that it does not imply an absolute *ipso facto* turning back of the land into the hands of the Crown, but amounts to nothing more than if the word "forfeiture" had been used. "Forfeit" is a term well known to the law, and one of the incidents attaching to it is that a person entitled to enforce a forfeiture may waive or enfore it at his option, and that, until he declares his will, the forfeiture does not arise. If we look at the whole purview of the Act we can see no reason why we should not attach the same incidents to the word revert as attach to forfeiture. The argument of *humanity* has been objected to; but surely, in construing an Act of Parliament, we are entitled to look at the probable consequences of the construction, in order to see what the intention of the Legislature is likely to have been. And here the result of the construction contended for by the defendant would be most inhuman. Take the case of a failure to pay the interest on the balance on the day on which it fell due. It might happen, through some accident, entirely without the fault of the selector; and yet the land would go back at once absolutely to the Crown, without the Crown having the opportunity of exercising any discretion in the matter. I cannot think that the Legislature can have contemplated such an extreme measure as this. Of course, if the Legislature used words which inevitably mean it, we must yield to them, but looking at the whole purview and the objects of the Act, I do not believe it was the intention of Parliament to use the word "revert" in its stricter legal meaning. I think that nothing more was meant than if the word "forfeiture" had been used, and that interpretation seems to me reasonable, which leaves to the Crown a discretion to be exercised according to the circumstances of each particular case. I can see no grounds for interfering with the verdict in this case.

Rule discharged with costs.

Attorney for plaintiff—*R. W. Robberds.*
Attorney for defendant—*W. Russell.*

BLAXLAND *v.* THE AUSTRALASIAN STEAM NAVIGATION COMPANY. (*a*)

DRURY *v.* THE SAME. (*a*)

Negligent use of Warp—"Fairway"—Evidence of Negligence—New Trial.

The Navigation Act (35 Vic., No. 7), s. 120, enacts that the master of every ship or vessel navigating any harbour, &c., shall, so far as may be practicable, keep on that side of the fairway or mid-channel thereof which lies on his starboard hand.

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.), that these words do not compel a steamer to navigate in the fairway, but only to fix the rule of the road for vessels plying in the harbour. A small ferry-boat plying outside the limits of the fairway, as marked by the Marine Board, is not departing from the rule.

At the trial of an action for negligence, Sir *W. Manning*, J., told the jury that it did not follow because a plaintiff was somewhat in the wrong, that he should suffer when the substantial main wrong was on the other side; and that in that case he would not be responsible, although there might be some degree of wrongfulness on his side which might have caused the disaster.

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.), that the direction was wrong.

The defendants warped out a large screw steamer from their wharf at 11 o'clock on a dark night with a warp from 300 to 400 feet in length. The steamers which usually left the wharf at that hour were paddle-boats and used no warp. No notice was given of the change of steamers, nor was any precaution taken to warn persons of the presence of the warp, which was not visible. The steamer in which the plaintiffs were ran into the warp and they were injured.

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.), that there was sufficient evidence of negligence to support verdicts for the plaintiffs.

Per HARGRAVE, J.: The rule in navigation is that a vessel in motion should keep out of the way of a vessel stationary, and the plaintiff was bound to prove affirmatively that no act on his part contributed to the accident.

BLAXLAND'S CASE.

DECLARATION.—1. That the plaintiff was a passenger on board of a certain steam ferry-boat plying in the navigable waters of Port Jackson, and the defendants were possessed of a certain steamship, and by their servants were navigating and directing the same in the navigable waters aforesaid away from a certain wharf of the defendants, and the defendants then wrongfully and negligently fastened a rope or hawser from the said steamship to a certain other wharf, and kept the same so fastened for a long time and at such a height and in such a manner over the said waters between the said steamship and the said wharf as to be in the way of and to obstruct the course of vessels lawfully passing over the

(*a*) August 28.

said waters, and to cause them to be in great danger of striking against the said rope or hawser and of being thereby greatly injured and damaged, whereof the defendants and their servants then had or ought to have had notice. Yet the defendants wrongfully and negligently omitted to take any care or precaution in that behalf to prevent or guard against the said danger or to give due notice or warning to vessels lawfully passing along the said waters as aforesaid of the said rope or hawser being stretched as aforesaid, or of the said danger to which such vessels would be exposed. Averment, that whilst the said steamship of the defendants was being navigated and directed as aforesaid, and the said rope or hawser was stretched between the said ship and wharf as aforesaid, and by means of the premises, and without any neglect or default of the persons in charge of the said steam ferry-boat, it ran against the said rope or hawser so fastened as aforesaid, and by means thereof the plaintiff was knocked down and injured. Allegations of special damage. 2. That the defendants by their servants so negligently and unskilfully managed a steamship of the defendants upon the navigable waters of Port Jackson, and so negligently placed and maintained a certain rope or hawser used by them in the navigation of the said steamship, that a certain steam ferry-boat, upon which the plaintiff was then travelling as a passenger, then lawfully navigating the said waters, and without any default of the persons in charge of the said steam ferry-boat, and by and through the negligent and wrongful conduct of the defendants by their servants ran against the said rope or hawser with great force and violence; whereby the plaintiff, then being on the said steam ferry-boat, was knocked down and greatly injured. Allegation of damages as in the 1st count.

PLEA. Not guilty.

At the trial of the action before Sir *W. Manning*, J., at the Sydney August sittings, the following facts appeared in evidence. On the night of the 12th of February the "Nautilus," a ferry-boat of about ten tons, plying between Sydney and the Parramatta River, left the wharf in Darling Harbour, at the foot of King-street, at 11 o'clock. It was the ordinary practice for her to leave at that hour every Monday night. The plaintiff was a passenger. It is the practice of the defendants to despatch a steamer for the Hunter River every night at 11 o'clock. The steamers ordinarily used for that service are paddle-boats and back out stern foremost, until they head in the proper direction. They never use a warp to swing by. On the night in question the paddle-boat which would have started in the regular course was laid up, and the "Wotonga," a large screw steamer of 1000 tons, was put on the berth in her place. She was lying at the

jetty at the foot of Margaret-street with her stern pointing outwards, and at 11 o'clock backed out stern foremost with a warp fastened at one end to her starboard quarter, at the other to a jetty on the south side of Margaret-street. At the time that the accident happened the warp was taut, and the distance between the "Wotonga" and the wharf was at least 300 feet (though the evidence as to the exact distance was conflicting). The "Nautilus" going at the rate of 6 knots, according to one of the witnesses, at 8 or 9 knots, according to others, steered between the "Wotonga" and the shore and ran against the warp, carrying away her funnel and sustaining other damage. The plaintiff was knocked down and seriously injured. The night was dark, and neither the persons in charge nor the passengers on board the "Nautilus" saw the warp. Evidence was given on behalf of the defendants by witnesses of experience that the use of a warp was usual and proper in the case of a screw-steamer leaving the wharf; that the warp was visible, being rendered luminous by the phosphorescence of the water dripping from it; that the "Nautilus" changed her course; and that so short a time elapsed after she changed her course until she struck the warp, that no steps could be taken, either by letting go the warp or otherwise, to avert the danger. Some of the defendants' witnesses also stated that it was easy to distinguish a screw-steamer from a paddle-steamer; and that the captain of the "Nautilus" ought to have seen that the "Wotonga" was a screw-steamer and to have known that a warp would be required and used. Upon the questions whether the arrangements for a look-out on the "Nautilus" were defective or not, and whether the "Nautilus" was pursuing her usual course, the evidence was contradictory. The "Nautilus" was not in the fairway of the harbour, as defined by the Marine Board Regulations, and it was insisted on the part of the defendants that this was an infringement by the "Nautilus" of the 120th section of the Navigation Act, which provides that "the master of every ship or vessel, navigating any harbour, river, channel, port or place within the jurisdiction, shall, so far as may be practicable, keep on that side of the fairway or mid-channel thereof which lies on his starboard hand."

The learned Judge, at the close of his summing-up, put a series of questions to the jury which, with the findings of the jury in answer to them, are as follows:—

Q. Was it a reasonable use of the right of navigation in Darling Harbour, and in such a position as off the Hunter River jetty and Russell's jetty, to back out a screw steamer such as the "Wotonga" stern foremost, and on a dark night, from the Hunter River wharf and with a hawser attached to the end of Russell's

wharf and stretching 380 feet therefrom towards the centre of the harbour, and to keep the hawser so stretched during the process of getting the steamer's head round to her intended course of navigation?

A. We find it was not a reasonable use of the right of navigation, unless special precautions were taken to prevent accidents.

Q. Was such use reasonable in this case, having reference to the facts that such vessels have not heretofore been despatched from the said Hunter River wharf, but that paddle-steamers only have hitherto used that wharf, and that they were backed out by steam and without the use of such hawser, and to the further fact that the Parramatta steamers hitherto customarily started from King-street wharf at the same time, and have habitually taken the course which a hawser stretched as before mentioned would obstruct?

A. We find that the use in this case was not reasonable, in substituting a screw-steamer for a paddle-steamer without due notice and precaution.

Q. Did reason require that, under the circumstances of this case, the A.S.N. Co. or its officers should have given any special notice or warning of the course intended to be adopted with the "Wotonga" on the night of the plaintiff's injury, or that they should have used any other special precautions, or have done any act other than such as were done to prevent the risk of accident through the use of the "Wotonga's" hawser, or to prevent the accident when imminent?

A. We find that the A.S.N. Co. should have given notice of the intended alteration of the steamer, and placed a boat with a danger signal near the hawser, and, not having done so, should be prepared to drop the hawser on the approach of the "Nautilus."

Q. Did the persons in charge of the "Nautilus" exercise such care as was reasonable to prevent the collision, or did they fail therein, and thereby bring about the accident by which the plaintiff was injured?

A. We find that no blame is to be attached to the "Nautilus," as she was pursuing her usual course.

Q. Was the disaster which forms the subject of this action the result of accident only, without default on the part of the defendants and their officers occasioning the same?

A. We find that it was want of due precaution on the part of the A.S.N. Co.'s officers which caused the accident to the "Nautilus."

The jury also found a general verdict for the plaintiff, with £150 damages.

A rule *nisi* for a new trial was now moved for on the following grounds:—1. That the verdict was against evidence. 2. That his Honor ought not to have told the jury that although those in command of the "Nautilus" might have been somewhat in the wrong, and although there might have been some degree of negligence on their part which caused the disaster, yet if the substantial main wrong was on the part of the defendants, the defendants were liable. 3. That his Honor ought to have told the jury that the question for them was whether the damage was occasioned entirely by the negligence or improper conduct of the defendants, or whether those in command of the "Nautilus" so far contributed to the misfortune by their own negligence or want of ordinary care or caution, that but for such negligence or want of ordinary care or caution the damage would not have happened. 4. That his Honor ought to have told the jury that, even if they were of opinion that the use of a warp was, under the circumstances, dangerous, yet that warps having been used for many years without accident, the defendants were not bound to take, or not liable for not taking, precautions against every remote or contingent possibility of accident. 5. That his Honor ought to have told the jury that the plaintiff was bound to point out with reasonable certainty what particular precaution might or ought to have been resorted to by the defendants for the purpose of preventing the accident which happened. 6. That his Honor ought to have told the jury that if those in command of the "Nautilus" failed to comply with the statutory rules and regulations as to the fairway in the harbour, whether the failure to do so arose from want of look-out or want of proper judgment, want of nautical skill or other causes, and such failure either directly or indirectly contributed to the accident, the plaintiff could not recover.

The 2nd ground refers to the following passage from the short-hand notes of the charge of the learned Judge:—"The argument has been put forward that the 'Nautilus' was contributory to her own wrong. That, however, is an argument which must be taken with qualification. In a certain sense, every person in an accident may be said to be contributory to his own wrong. A person going down George-street, for instance, may meet with an accident, which he would not have met with if he had been going up. But that is not the meaning. The meaning must be that a person by his own negligence or act of wrongfulness got himself into the very difficulties of which he afterwards complains. And even this must be taken with qualification; that is to say, he may be somewhat in the wrong; but it does not follow because he may be somewhat in the wrong that he is to suffer punishment, where

the substantial main wrong is on the other side. In that case he would not be responsible, although there might be some degree of wrongfulness on his side which might possibly have caused the disaster. The jury have to judge where the wrong substantially was which caused the accident."

Darley (*Butler*, Q.C., with him) moves for a rule. In this case we complain of his Honor's direction on several grounds. The 2nd and 3rd grounds may be conveniently argued together, as they both touch the question of contributory negligence. [Sir JAMES MARTIN, C.J.: How can that question arise here? Could the contributory negligence of the master of a vessel affect the right of a passenger to recover for an injury?] There are cases which shew it is so and that the passenger is responsible for the way in which the vessel he sails is conducted (*b*). At any rate, his Honor at the trial ruled in our favour on the point, and told the jury to consider, not whether the plaintiff was wrong in any way, but whether the persons in charge of the "Nautilus" were wrong, and that if the accident was caused by the wrong-doing of the "Nautilus," then the plaintiff was part and parcel of the "Nautilus," and must take the consequences of being unfortunately in the vessel which was in the wrong. What we complain of is that his Honor ruled that the person injured would not be barred by some degree of negligence if the substantial wrong was on the other side. The principles laid down in *Tuff* v. *Warman* (*c*) are not reconcilable with the direction. *Dowell* v. *The General Steam Navigation Company* (*d*) is to the same effect. There the preponderance of the blame was on the side of the defendant; yet the plaintiff was held disentitled to recover. His Honor was asked at the trial to put the propositions in the 4th and 5th grounds to the jury, but he declined. The 5th ground is framed on remarks of *Willes*, J., in *Daniell* v. *The Metropolitan Railway Company* (*e*). He says: "It is not enough for the plaintiff to shew that there has been an accident on the defendants' line and thence to argue that therefore the company are liable even *primâ facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further, and say that the plaintiff

(*b*) On a later day the *Chief Justice* mentioned that there were two authorities to the effect stated by Mr. *Darley*, *Thorogood* v. *Bryant*, and *Cattlin* v. *Hills*, 8 C.B. 115, 123; but they were commented upon in *Tuff* v. *Warman*, 2 C.B. N.S. at p. 750, as being inconsistent with earlier decisions, and were not followed by Dr. *Lushington* in the case of the *Milan*, 31 L.J. Adm. 105. (*c*) 2 C.B. N.S. 740. (*d*) 5 E. & B. 195. (*e*) L.R. 3 C.P. 222.

should also shew with reasonable certainty what particular precaution ought to have been taken." That case went on appeal to the House of Lords, and Lord *Hatherley*, in delivering judgment, uses expressions which are relied upon in support of the 4th ground. He says (*f*): "In a case in which the work is being carried on by competent and intelligent persons accustomed to the business, and in respect of which the evidence is simply this—that although the work may be considered dangerous, the workmen employed in it have never known an accident before this time, and where the particular accident which has occurred was occasioned by a change from the cautious mode of doing the work to a more incautious mode of doing it, to hold the railway company liable for an accident of that description would, I think, be extending the liability of the company for damages, in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident, to an extent beyond anything that has been laid down in any case with which I am acquainted, and which, indeed, common sense would not warrant." So here warps had been used for 20 years without a single accident, and the defendants were not bound to take precautions against "every remote and contingent possibility of accident." [Sir JAMES MARTIN, C.J.: That case was decided on quite a different ground, viz., that the persons who caused the accident were not in the employment or under the control of the defendant. That distinguishes it from this case.] As to the 6th ground we contended that, on the true construction of the Act 35 Vic., No. 7, s. 120, it is an improper thing for a harbour or river steamer to navigate out of the fairway. [Sir JAMES MARTIN, C.J.: You admit that the "Nautilus" was on the right side of the fairway, but your contention is that she ought not to have been outside it?] Yes. In analogy to *Peltier* v. *Darwent* (*g*), we say that, the "Nautilus" being in the wrong, if our warp had been injured, we might have maintained an action for their breach of the proper course of navigation. [Sir W. MANNING, J.: That case is plainly distinguishable; the rope there was a punt rope, and was placed lawfully and permanently across the river, and the defendant knew it was there.] In the *Hand of Providence* (*h*) it was held that such a custom as was attempted to be set up here for river steamers to navigate out of the fairway, cannot be maintained against the express provisions of a statute. Section 119 gives power to the Marine Board to define the "fairway" which they have done by regulation 63. By section 120 it is enacted that "the master of every ship navigating any harbour, &c., within the jurisdiction shall, so far as may be practicable, keep on that side

(*f*) L.R. 5 E. & I. App. 56. (*g*) 9 S.C.R. 133. (*h*) Swa. 107.

of the fairway or mid-channel thereof which lies on his starboard hand. And any such master who shall neglect to comply with the said rule shall incur a penalty not exceeding £5 and be further liable for any damage he may cause by any departure from the said rule unless he can shew that circumstances rendered such departure necessary." [Sir JAMES MARTIN, C.J.: You import words into the section which are not found there. You read the section as if it were "on that side of *and in* the fairway."] Navigating the harbour, we say, means navigating the fairway.

DRURY'S CASE.

The pleadings were similar to those in *Blaxland's case*, the only difference being that the plaintiff was the master of the "Nautilus." He was also injured by the collision. This action was tried on the 9th, 10th, and 13th of August, before Sir *James Martin*, C.J., and a jury, and a verdict was given for the plaintiff with £50 damages. A rule *nisi* for a new trial was now moved for on the grounds of the verdict being against evidence and misdirection. The misdirection complained of was the omission of his Honor the *Chief Justice* to tell the jury that if those in command of the "Nautilus" failed to comply with the statutory rules and regulations as to the fairway in the harbour, whether the failure to do so arose from want of look-out, want of proper judgment, want of nautical skill, or from other causes, and if such failure, either directly or indirectly, contributed to the accident, the plaintiff could not recover.

Butler, Q.C. (*Darley* with him), for the defendants, moves for the rule. What we chiefly complain of is the construction put upon section 120 of the Navigation Act. We say that the plaintiff had no right to navigate out of the fairway, or, if he did so, it was at his own risk. The *Fanny M. Carvill* (*i*) decides that in the case of an infringement of a statutory regulation followed by a collision, it is not necessary to shew that the infringement directly contributed to the collision. As to the other grounds, the evidence was overwhelming that no reasonable precaution was neglected which might have prevented the accident, and that there was no negligence on the part of the defendants.

Sir JAMES MARTIN, C.J. I will deal with the case of *Blaxland* v. *The A.S.N. Co.* first. This action was brought against a steam navigation company for wrongfully and negligently placing across a portion of the harbour of Port Jackson a warp attached at one end to a wharf, at the other to a vessel belonging to the defendants. The plaintiff Blaxland was a passenger on board a small steamer, the "Nautilus," which left King-street wharf at 11 o'clock on the night of the 12th of February, and,

(*i*) 44 L.J. Admx.

proceeding in the direction of the Parramatta River, came into collision with the warp. The small steamer was damaged and the plaintiff was injured. It is for these injuries that this action was brought.

The law with reference to this class of cases has been very clearly laid down. A person using a warp, or a vessel, or anything else, the use of which may be dangerous, is bound to take all reasonable care to avoid injury to others. On the other hand, a person going along the highway or upon the navigable waters of the harbour is also bound to take reasonable care to protect himself against accidents which by the exercise of care might be avoided. The duty of taking reasonable care is imposed on all persons alike. A defendant who is charged with negligently inflicting an injury is not liable to have a verdict found against him simply upon proof of negligence on his part, if it can be shewn that the plaintiff by reasonable care could have avoided the accident. It is never the question between the parties in these cases whether the defendant's conduct *mainly* or *substantially* contributed to the injury, or on which side the balance of negligence lay. The only question is whether the accident was wholly caused by the defendant's want of care, or whether there was, on the plaintiff's part, a want of reasonable care without which the accident would not have happened. One of the grounds taken in the memorandum is that his Honor misdirected the jury in telling them that although those in command of the "Nautilus" might have been somewhat in the wrong, and although there might have been some degree of negligence on their side which caused the disaster, yet if the substantial main wrong was on the part of the defendants, the defendants were liable. Taking this ground to be a correct representation of his Honor's direction on this point, I think that it was a wrong ruling. If there had been no special finding of the jury, I should have been constrained to grant a new trial on the ground of wrong direction. But I find his Honor put the following question to the jury: "Did the persons in charge of the 'Nautilus' exercise such care as was reasonable to prevent the collision, or did they fail therein, and thereby bring about the accident by which the plaintiff was injured?" The jury did not answer that directly, but they said: "We find that no blame is attached to the 'Nautilus,' as she was pursuing her usual course." I think, therefore, that the jury must be taken to have found that the injury was not caused by any want of care on the part of the plaintiff, and that being so, it appears to me that the ruling, whether right or wrong, was wholly immaterial. The jury found that there was *no* negligence on the part of the

plaintiff or of those in charge of the "Nautilus." Therefore, though I am of opinion that his Honor's ruling was erroneous, it affords no ground for granting a rule, for the reasons I have mentioned.

Another ground taken is that his Honor ought to have told the jury that, even if they were of opinion that the use of a warp was under the circumstances dangerous, yet that warps having been used for many years without accident, the defendants were not bound to take, or liable for not taking, precautions against every remote or contingent possibility of accident. I think his Honor was not bound to tell the jury anything of the kind. It is not for a Judge to imagine and deal with every conceivable circumstance surrounding an accident. Some kinds of property require to be used with much greater precaution than others, and the care and caution required under different states of circumstances vary infinitely. The Judge is not bound to contrast the different degrees of care which will be required in different cases; all he is bound to do is to lay down broad principles to guide the jury. Questions of negligence or reasonable care are matters for the jury, and are not matters of law for the direction of the Judge. I think his Honor would have been altogether wrong if he had told the jury what is now contended for.

As to the fifth ground, I think his Honor was not bound to point out, and that the plaintiff was not bound to point out, what particular precaution ought to have been taken to prevent the accident. It was a matter for the jury. Some things are obvious without any evidence; the jury may understand them from every day experience. Evidence is not required in a case like this to suggest every way in which danger can be averted; still less is it necessary to give evidence of that which the common knowledge and experience of the jury would tell them for themselves. I think the expression of Mr. Justice *Willes*, to which we have been referred, ought not to be read in the literal way suggested.

We come now to the sixth of these grounds. [His Honor stated the ground.] We have had before us the statutory regulations and the statute itself. The different provisions amount to this—that power is given to the Marine Board to fix the limits of the "fairway," "within which it shall be unlawful for any ship or vessel to bring up;" and it is further provided that the master of every vessel navigating the harbour "shall, so far as may be, keep on that side of the fairway or mid-channel which lies on his starboard hand." It has been insisted on over and over again before us that "navigating the harbour" means navigating the fairway, and that, therefore, persons navigating out of the fairway are guilty of such a breach of the regulations as to disentitle them

to recover damages for any injury they may sustain. That would be so if the contention as to the meaning of the statute were correct. If a departure from the rule would make a person liable for any damage he might cause, it is clear that a similar departure would preclude a person from complaining of damage he might receive. Two words are used in the 20th section—"fairway" and "mid-channel;" and I look upon that section merely as a direction to masters of vessels to pass each other on the right side, the rule of the road on the water being just opposite to what it is on land. It does not appear to me that the words of the section convey any direction to navigate within the fairway. The regulation which fixes the limits of the fairway imposes a penalty of £5 on persons bringing up within these limits, but there is nothing to interfere with the right of everyone to the use of the whole of the harbour as a highway. The precautions required may depend on many things, such as the number of vessels at anchor, the time of night, and other matters; but the right which the public has to go over every part of the harbour is undoubted. On the other hand, there is the right of persons to go to wharves, and to use proper and reasonable means for going to or coming out from those wharves. The two rights exist together, and the only question is whether people do reasonably what they are lawfully entitled to do. I am of opinion that there was no misdirection on this point.

The last ground is that the verdict was against evidence. This accident took place at 11 o'clock on a dark night, a very large vessel (1000 tons) being warped out from the defendants' wharf. There was evidence that the length of the warp was 400 feet. The night was so dark that Captain Munro, who is the defendants' superintendent, went under the warp in a boat and did not see it. The "Nautilus" was in the habit of going to the Parramatta River at that time, and when steaming along about 200 feet out from the shore, and travelling at the rate of about six miles an hour, she came into collision with the warp. The question whether the verdict was against evidence will depend on whether there was any evidence of negligence to go to the jury. I am of opinion that there was some evidence. The length of the rope used; the darkness of the night; the fact that there was a fresh wind blowing from the S.; a screw-steamer leaving at an unusual time; the absence of any boat to warn people of the danger, or any other precaution against accident;—all these were circumstances which the jury were entitled to take into consideration upon the question whether or not there was negligence on the part of the defendants. Then, again, were the jury justified in coming to the conclusion that there was no contributory negligence on the part

of the plaintiff? Well, all the evidence shewed that the "Nautilus" was going the usual course at a moderate speed; that there were apparently 400 feet clear between the "Wotonga" and the shore, and that no warp was visible. I think, in the view I take of all these grounds, that the rule ought to be refused.

In the other case the facts proved were substantially the same, and there was the additional fact that, although screw-steamers had occasionally left after dark, the ordinary boats leaving the wharf at night were paddle-steamers. I put it to the jury whether it was wrong on the part of the plaintiff to go at the rate of six miles an hour under the circumstances, or whether he ought to have gone at a lower rate of speed. On the other hand, the jury were told that they might take into account the fact that paddle and not screw-steamers usually left the wharf at that hour. No exception has been taken to my ruling except on a point with which I have dealt in considering the other case. The jury must have found that there was want of care on the part of the defendants, and I cannot say that that verdict was wrong.

The rule in this case also ought to be refused.

HARGRAVE, J. It is my rule never to allow a rule *nisi* for misdirection unless, upon the whole of the Judge's summing up, the law is laid down unduly in favour of one side. I think Sir *W. Manning* did not put the case as strongly as he ought to have put it for the defendants. It is admitted in both these cases that the defendants were doing what was absolutely right and proper with this steamer of theirs. They were using the common, ordinary, recognised means of starting her from the wharf, and I think this ought to have been the leading idea put before the jury in the summing up. I think a rule ought to be granted. The defendants' ship was, as it were, fettered by this warp. The point of contributory negligence depends upon this consideration. But it was not put before the jury at all. All the rules of navigation are founded on this principle. A steamer must keep out of the way of a sailing vessel; a vessel in motion must keep clear of a vessel stationary. And here as the plaintiff had the option of going outside if he liked, the *onus probandi*, it seems to me, lay upon him to shew that the accident did not arise from any act on his part. Independently of any verbal criticisms on the summing up, but taking it as a whole, I think this rule should be granted. It seems to me that the rule laid down by Mr. Justice *Willes* in *Daniell* v. *The Metropolitan Railway Company* does apply, where a person is in the lawful exercise of lawful acts and an accident happens, and that the decision of the House of Lords in that case is also applicable. I also think that the special verdict and findings of the jury were against evidence

and cannot be supported. The plaintiff was bound to satisfy them that he in no way contributed to the accident, and I do not think he made out his case. Besides, where two cases like this have been tried, and different rulings have been given by the Judges before whom they were heard, it is best that the whole law bearing on the point raised should be examined by the Full Court. I only speak of the case as it stands at present, without having heard the other side, but I think a sufficient case has been made out for granting a rule *nisi*.

Sir W. MANNING, J. I think there should not be a rule in either case. The verdict seems to me to have been perfectly right, and I should have been astonished if any other conclusion had been arrived at. Before two juries and two Judges the result was the same. And I put a series of questions to the jury with the express object of avoiding as much as possible the harassing effect of a motion for a new trial. I think it is the duty of a Judge at *nisi prius* to do so, in order that if any question of law afterwards arises, the Full Court may afterwards have before them the finding of the jury on each distinct point, and that it may not be necessary to send down the case a second time for trial.

As regards my ruling, their Honors have expressed dissent, the *Chief Justice* on one point, thinking my ruling too strong on that point, and Mr. Justice *Hargrave*, as I take it, on the 4th ground. I think that ground is sufficiently met by the observation that it involves a misstatement of fact. It had not been the practice at that particular wharf to warp out screw steamers at that time of night. In fact there was evidence before me that it had never been done before. It is idle to say that in other places where there was not the same danger it had been the practice to use warps in this way; the only question is whether at this particular place there was such an established practice that everyone must be taken to know of its existence. On the contrary, there was evidence that it was not the practice, although it was proved that other screw steamers, out of the course of the ferries altogether, used to leave their wharves at night. What was done at these other wharves had no more bearing upon the case than what was done at Calcutta. Upon that ground I have not the slightest doubt.

On the other point I have some misgivings. Certainly the *ipsissima verba* of the shorthand note of my summing up go too far; and if my attention had been called to *Tuff* v. *Warman* I would have adopted the words in that judgment. What I had in my mind was that, suppose a danger imminent, and a person turns to the right instead of the left; if there were some slight error of judgment caused by the small opportunity for reflection, it ought

not to be visited on the person who suffers from an injury mainly caused by the other side. To put it merely as a question of balance was not what I meant; but I meant that the real substantial injury must be on the other side and then that some slight error on the plaintiff's part would not disentitle him to recover. But I now think my words went too far—if I used them. I would have preferred counsel's notes of my charge, and think it would be found that the general tenor of what I said qualified these particular expressions. Indeed, the very questions I afterwards put to the jury must be taken as qualifications of my words.

As to the question what precautions were necessary. Mr. *Stephen*, in opening the case to the jury, argued that special precautions ought to have been taken. The evidence of Drury was that no notice had been given of the change of steamers, and that the warp might have been dropped when the "Wotonga's" people saw the "Nautilus" approaching. But I agree with the *Chief Justice* that no evidence was necessary at all. I told the jury that they ought to be guided by considerations of common sense and common humanity; and that the defendants should not use a warp 400 feet long, stretched across the harbour like an invisible wall, without giving some warning. I can scarcely think it would have been too much for the Steam Navigation Company, knowing as they did that the usual course was being departed from, to publish some notification. If they had sent a messenger round to the "Nautilus" to warn her people, knowing that they started at that time, the accident might have been avoided. The defendants were pursuing an unusual course, the plaintiff a usual course. It is obvious to every man of ordinary sense and humanity that some precautions ought to have been taken. It is now said that evidence ought to have been given on the point. Take the case of an accident occurring in a fog; is the plaintiff to give evidence that a fog-horn ought to be blown? These were common matters of every day experience which the jury could decide for themselves without any evidence.

As to the question of navigation in the fairway, what I said at the trial appears from the report to have been as follows:—"As to the fairway, I think the argument as to that has been carried a little too far on behalf of the defendant. It does not follow because the navigation rules are for the purpose of keeping a fairway for vessels going up and down the harbour, that other vessels should not keep out of the fairway, if they keep their respective sides, which is exactly on the same principle as in the street; and it does not follow that other vessels have not the right to use the open space between the fairway and the land if it suits their convenience. It seems here that the Parramatta

River steamers have been in the habit of doing this for a long period; they went at an angle to the fairway, and thence across to the Darling-street wharf. They have a perfect right to do so, subject of course to the ordinary incidents of navigation; that is to say, vessels leaving their moorings in a reasonable way to go out. Where there is apparently a clear passage, and no hawser is ordinarily used, there is nothing to restrict the right of navigation. In fact I think that these small harbour steamers have no business to keep along the fairway at all. The fairway would be obstructed if all the little ferry boats were to run forwards and backwards along it." The evidence of Mr. Jeanneret shewed the reason why the Parramatta steamers took the course they did. It was in order to keep clear of the other lines of ferry steamers. And it seems only reasonable that each should pursue a slightly different course, each using his right of navigation so as to interfere as little as possible with the rights of others. But if there is to be any refinement on this point, it must be remembered that the "Wotonga" was in the fairway at that very moment, obstructing the very portion of the fairway along which the "Nautilus," according to the defendants' contention, ought to have travelled. Surely they cannot now say, "You ought to have been there," when they were themselves obstructing the passage. I am clearly of opinion that there was no obligation on the "Nautilus" to navigate in the fairway.

Rules refused.

Attorneys for defendants—*Daintrey & Chapman.*

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NEW SOUTH WALES

IN THE FOURTH TERM, 1877.

FLOOD *v.* LONGFORD. (*a*)

Ejectment—Crown Lands Alienation Act of 1861*—Conditional Purchase—Sufficiency of Description.*

The defendant applied to conditionally purchase land which he described in his application as follows:—County of Bourke, parish of Berimbed; 40 acres situated between the 16 and 17 mile trees on the road from Narandera to Wagga Wagga, and includes two small sandhills and waterhole.

Held **(Sir JAMES MARTIN, C.J., *dissentiente*), that, taking into consideration the facts that the defendant had occupied and improved the land, and that he had continued to pay interest on the balance of the purchase money, which had been accepted by the Government, and that the evidence did not shew that there were other sandhills or waterholes in the neighbourhood of the selection, the description in the application was sufficient.**

EJECTMENT. The action was tried at Wagga Wagga on the 6th of October before *Faucett*, J., and a jury of four. At the trial the plaintiff put in a grant from the Crown to him of the land mentioned in the writ. The defendant then put in his original application to conditionally purchase certain land described as follows:—"County of Bourke, parish of Berimbed; 40 acres situated between the 16 and 17 mile trees on the road from Narandera to Wagga Wagga, and includes two small sandhills and a waterhole." The conditional purchase was prior to the plaintiff's grant. The defendant then proved that he had occupied the land applied for by him, and had complied with the conditions of residence and improvement, and had paid and was still paying the interest on the balance of his purchase money. Such interest had been accepted by the Government. He also stated in his evidence that the land occupied by him as his conditional purchase was the land mentioned in the writ. The plaintiff, in reply, put in a certified copy of the minute of the Governor and Executive Council declaring the defendant's conditional purchase forfeited, and the *Gazette* containing a notification of the forfeiture. The jury found that the conditions of residence and improvement had been complied with by the defendant, and his Honor directed a verdict for the defendant.

(*a*) November 26.

Backhouse, on behalf of the plaintiff, now moved for a rule *nisi* for a new trial on the grounds:—1. That his Honor should have directed a verdict for the plaintiff, as the defendant's conditional purchase was invalid for non-compliance with the provisions of the Crown Lands Alienation Act of 1861, inasmuch as the written application of the defendant was unintelligible and void for want of certainty; 2. That his Honor should have directed a verdict for the plaintiff on the ground that there was not sufficient evidence to shew that the land in the occupation of the defendant was the land described in his written application. He cited *Emery* v. *Barclay* (*b*).

Sir JAMES MARTIN, C.J. This is an action of ejectment brought to recover possession of 40 acres of land. The plaintiff, in support of his case, put in a grant from the Crown to him of 40 acres, the description in the grant corresponding exactly with the description in the issue. There he left his case, having clearly made out his title as grantee from the Crown of the land for which the action was brought. The defendant, in answer, set up that he had conditionally purchased the land before the issue of the grant, put in evidence his original application, and gave evidence that he paid the deposit, went into occupation, resided upon and improved the land, and paid interest on the balance of his purchase money up to the end of the present year. There he rested his case. The plaintiff, in reply, put in a copy of the *Government Gazette* containing a notification of the forfeiture of the defendant's selection. On this evidence the case went to the jury, who, under his Honor's direction, found a verdict for the defendant.

A rule is now moved for substantially on the ground that there was no conditional purchase at all by the defendant. I am clearly of that opinion. Section 13 of the Crown Lands Alienation Act authorises any person to conditionally purchase not less than 40 nor more than 320 acres by tendering to the land agent for the district a written application. The application must be, by the statute, a *written* application, and no application is worth anything if it is partly in writing and partly verbal. And to be worth anything the application must contain a description shewing what land is applied for. If the application is merely for 40 acres without specifying the situation, a person cannot, by going on a particular piece of 40 acres, make that application good. If that were so there ought to have been clauses in the Act providing that land might be taken up without any application at all, and that residence and improvement on any piece of land a man chose to take up would give him a title. But there are no such clauses. And in order to see what is applied for in each case we must either be

(*b*) 8 S.C.R., 381; *per* Sir A. STEPHEN, C.J.

able to identify it within the four corners of the description, or else the description must refer to something by which the situation can be fixed. That is sometimes done, and in the late case of *Martin* v. *Baker* (*c*) this Court held a description of a mineral conditional purchase sufficient which referred to markings on the ground. Or if the land has a well known name it may be described by that; and there is no doubt that if there are any well marked natural features such as rocks, or peculiar trees, or rivulets, the application may speak of the land with reference to these. The question is, is that done here? The application is in these terms:—[His Honor read the description].

Now I have no doubt that the road from Narandera to Wagga Wagga is capable of being ascertained; there may be several tracks, but probably the direction of the main road may be fixed with sufficient precision. Then, of course, the trees can be ascertained; but the difficulty is at what point of the intervening space does the selection begin? It is not said at which side of the road it is, nor are the lengths and directions of its boundaries given. The land is described as including "two small sandhills and a water-hole," but there is nothing to shew that there are not numbers of sandhills and waterholes in the neighbourhood. So far as the application is concerned, it is no application for any definite 40 acres at all, by which the land taken up could be identified.

That being so, it appears to me that the defendant's whole case falls to the ground. The payment of the deposit, the occupation and improvement, and the payment of interest operate nothing, because there was no valid application. The defendant has taken possession of land without a legal application, and his possession gives him no title. This Act conferred a great privilege. It enabled a man for the first time, merely by making a written application and by paying a very small sum, to take land wherever he chose. It is not too much to expect that anyone taking advantage of the Act should comply with its clear provisions.

I do not think the case was at all affected by the *Gazette* which was put in evidence. The plaintiff did not by putting in the *Gazette* admit the validity of the defendant's selection; he only said—if your selection was valid, it has been duly forfeited. The fact that the Government recognised the selection of the defendant, for the purpose of forfeiting it, did not, it appears to me, shut the plaintiff out from shewing that it was invalid.

HARGRAVE, J. The decisions of this Court ever since 1861 have clearly established the legality of this description, if followed by occupation. If the description in an application is sufficient

(*c*) *Ante*, p. 418.

to guide an applicant in his occupation, that is all that is necessary Here the description refers to two sandhills and a waterhole, and the plaintiff did not shew that there were any other sandhills or waterholes within miles of these. There is therefore no ambiguity at all, and the only way in which we could decide against the validity of this application would be by adopting the old contention which has been over and over again disregarded in this Court: that it is virtually necessary for the selector to survey his land. If a selector identifies his land by a single marked tree, that is quite sufficient.

Then we have nothing to do with the plaintiff's grant or the declaration of forfeiture by the Government. This Court does not care either for grants or forfeitures if they were made without authority. If a man complies with the directions of the statute, he need have no fear of forfeiture. In this case the plaintiff admits that the defendant occupied this land and put improvements on it. The defendant has an infinitely better title than the grantee. He says, "I took up this land, I occupied it, I paid my interest," and he identifies the land with that claimed in the writ. I cannot see what better evidence of a title under the Lands Act a man could possibly give.

FAUCETT, J. I also think that the motion should be refused. The sole ground taken is that there was no conditional purchase. If the whole case rested merely on the description itself I should think that there was no way of fixing the position of the land applied for; but under all these circumstances I am of opinion that it was quite sufficient. The selection is described as being on the road, between two trees, and as including two small sandhills and a waterhole. There was no suggestion whatever that there were any other sandhills or waterholes in the neighbourhood. Are we to exclude a person from the benefit of this Act because he has not given the starting-point or described the boundaries with mathematical accuracy? Then there was the fact that his payments of interest had been accepted by the Government up to the present time. I must say that under circumstances of this kind it would require very strong evidence indeed to induce me to hold this application bad. My opinion is that the description was reasonably sufficient. The plaintiff himself put in the *Gazette* of the 7th of April, 1875, declaring the forfeiture and speaking of the land in question as a valid selection. And I am also clear that the *Gazette* of the 11th of June, advertising the land for sale by auction, was either in evidence, or was admitted at the trial to refer to the land as selected by the defendant.

Rule refused.

Attorney for plaintiff—*W. Williams.*

RICKETSON *v.* BARBOUR. (*a*)

Practice—No Memorandum filed—Mistake of Counsel.

No memorandum stating the grounds on which a rule *nisi* for a new trial would be moved for was filed in consequence of the erroneous advice of counsel that it was unnecessary.

Held, that this was not a sufficient ground for giving leave to file the memorandum *nunc pro tunc*.

Davis moved *ex parte* that leave might be given to the defendant in this action to file a memorandum giving notice of an application for a rule *nisi* for a new trial, and stating the grounds on which the rule *nisi* would be applied for. The defendant's affidavit shewed that the trial took place at Deniliquin in October, when a verdict was found for the plaintiff. The defendant at the trial was represented by two counsel, members of the Bar of New South Wales, but residing in Melbourne, and practising as barristers in the Supreme Court of Victoria. The defendant was advised by his counsel that he had good grounds for applying for a new trial, and that no steps need be taken until the first four days of Term, when a rule *nisi* should be moved for. It was sworn that both the defendant and his counsel were ignorant of the following Rule of Court: "A filed memorandum shall in all cases be necessary under the Rules of the 19th August, 1861."

The grounds on which the defendant intended to base his motion for a new trial were not stated in the affidavit.

HARGRAVE, J. This trial took place in October. That is so long ago that the defendant has had plenty of time to take the proper steps. Here there is no excuse whatever for not filing the memorandum. The fact of parties or counsel not knowing the rule is no reason for granting this application. If it were a case of accidental delay through storms, or floods, or anything of that kind, we ought to relax the rule on the principle that *actus Dei nemini facit injuriam*; but here there is nothing of the sort.

FAUCETT, J. Here is an application, made in the middle of the very last day on which a rule *nisi* could be moved for, to file a memorandum which should have been filed a month ago. And the application is founded on the ignorance of a most elementary rule of practice, one which ought to be known to every single person in the legal profession. I do not think we ought to relax a rule which has been uniformly acted upon for so many years (even if we have the power to do so) except upon very strong grounds.

Sir W. MANNING, J. We are asked to grant a favour simply on the ground that counsel did not know the practice of the Court. No special circumstances are shewn by the affidavit which

(*a*) November 29.

would entitle the defendant to this indulgence. If some very important point of law had been involved, I am disposed to think that we might relax our own rules, but here the defendant does not even state in his affidavit the points on which he intends to rely in moving for a new trial. I think the application should be refused.

Application refused.

Attorneys for defendants—*Stephen & Laurence.*

THE QUEEN *v.* WILLIAM JOHN THOMPSON AND MARY JANE THOMPSON. (*a*)

Criminal Law — Keeping Disorderly House — Hard Labour — 3 Geo. IV., c. 114, in force in New South Wales—13 Vic., No. 8.

The provisions of the Act 3 Geo. IV., c. 114, imposing the punishment of hard labour in certain misdemeanors, are in force in the colony of New South Wales.

The question of the legality of a *sentence* cannot be reserved under the 13 Vic. No. 8.

The defendants were convicted at the Sydney Quarter Sessions before *W. H. Wilkinson*, Esq., Chairman, of the offence of keeping a disorderly house, and were sentenced to a term of imprisonment with hard labour. The learned Chairman reserved for the opinion of the Court, under the Act 13 Vic., No. 8, the question whether the sentence was a legal one.

Foster, for the Crown, takes a preliminary objection that the point reserved was not matter of law arising at the trial. The trial ends with the verdict, and nothing which takes place subsequent to the verdict can be brought before the Court under the 13 Vic., No. 8.

Simpson, for the defendant, refers to *Reg.* v. *White.* (*b*)

PER CURIAM (*c*). We can only hear this case with the view of recommending the defendants for a pardon if the sentence appears to us illegal. We have no power to deal with the conviction ourselves. In *Reg.* v. *White* the record was before the Court on a case properly reserved, and the Court, having the sentence before it, could deal with it; but here no point arose at the trial.

Simpson. The only question is whether the Act 3 Geo. IV., c. 114, is in force in this colony. It has never been expressly adopted, but it was in force in England when the 9 Geo. IV., c. 83, was passed.

(*a*) November 30. (*b*) 13 S.C.R. 339. (*c*) Sir JAMES MARTIN, C.J., HARGRAVE and Sir W. MANNING, JJ.

PER CURIAM. We need not call upon Mr. *Foster*. The matter appears to be quite plain. We shall not make any recommendation.

Attorney for defendants—

SHEATHER *v.* THE CLARENCE AND RICHMOND RIVERS STEAM NAVIGATION COMPANY. (*a*)

Negligent navigation of a steamer—Evidence of negligence.

What is sufficient evidence of negligence by persons navigating a steamer considered.

This action was brought to recover damages for the loss of a boat belonging to the plaintiff, which was crushed by a steamer of the defendants and destroyed. The defendants pleaded not guilty. The trial took place at Grafton, before *Davis*, A.J., and the jury found a verdict for the plaintiff with £20 damages.

Pilcher now moved for a rule *nisi* for a new trial, on the grounds that there was no evidence of negligence to go to the jury, and that the evidence shewed contributory negligence on the part of the plaintiff.

The material evidence for the plaintiff was as follows :—

William Arkins : I was in the employ of plaintiff and had charge of his boat. I tied the boat to Ross's wharf, the large wharf where the steamers call. I went down to plaintiff's to dinner. When I came back I saw the "Agnes Irving" coming, and I shifted the boat to a smaller wharf lower down—I dare say 15 yards lower down. It is not in a line with the large wharf. There was a punt there, and I moored my boat between the punt and the bank. I had her tied to the wharf. The smaller wharf did not project as far into the river as the large wharf. The punt was moored by the stern; the midship was facing the wharf; it was moored in front of the wharf. The "Agnes Irving" came about 18 or 20 feet from the big wharf out into the river and threw the stern line ashore. Another young fellow and I caught the line and were pulling on it. We did not make it fast. The "Agnes Irving" slewed and went ahead. She slewed with her bow into the bank and went ahead, and I ran to the edge of Ross's wharf, and by the time I got there the bow of the "Agnes Irving" struck the punt, and the bowline of the punt broke, and she crushed the punt up against the boat and broke the boat to atoms. I have seen steamers going down the river at other times. I

(*a*) November 26.

never before saw a steamer slew her head into the bank. Considering the way the steamers usually come down the river, I considered the boat safe.

George Frazer: I was present on the bank of the river when the boat was smashed. I was on the bank, near the boat, on the same side of the river. I came out and saw the "Agnes Irving" coming in straight at right angles for Mr. Ross's wharf, which is below the steamer wharf. The boat was lying inside the punt. The "Agnes Irving" drove the punt right against the boat and smashed her against a log. There was way on the steamer—a little way. One of the lines carried away from the punt; it was her bow-line. I have seen the steamer coming down the river every week. I have at times seen them coming in at right angles like that. I never saw them break any boats before. I have seen them come in close to the punt and touch it, and not do it any damage; I mean the bow of the steamer might bump the punt. She missed the wharf; I can't say how. She then turned astern and came ahead again. To moor her you have to turn ahead and astern. To move ahead and astern would slew the steamer. It would move her bodily and cast her at the same time.

William Bradley: The first I saw was the steamer running bow-on against the lighter. She struck the lighter and jammed the lighter against the boat, and the boat against the shore. She smashed one of the lines of the lighter. If the steamer had come into the wharf in her proper place and had then gone on, she would have passed about eight yards from the boat. I have seen other boats moored there where the plaintiff's boat was. The lighter and launch are big heavy vessels; the boat is like a little skiff. The wharf is composed of two piles and a couple of planks out to them. I did not notice what the tide was that day. The tides there are very strong. I have not on former occasions seen steamers bump the punt. I have seen the punt shifted by steamers' lines. I have constantly seen steamers miss the wharf. They generally catch the wharf the first time. They sometimes miss and have to back, but I never saw them come in there.

Joseph Pratfield: I did not see the "Agnes Irving" coming down river. I saw her come in and strike the old Clarence punt. That drove in the punt on top of the boat and broke the boat. Mr. Ross ran down and let go the line. If this had not been let go the steamer would have doubled up the punt. The steamer was coming with force enough to break the punt. She was coming in stem-on. The "Agnes Irving" is a paddle-boat. The captain turned round and then the engines were reversed. I saw the steamer coming down the river. I can't say if she turned astern. I believe the line thrown out was missed. It was an ebb tide.

The tide caught her stern and turned her stern out. The tides are very strong, and steamers sometimes have a difficulty in getting to the wharf.

The following witnesses were called for the defence:—

John Mackenzie: I remember when the "Agnes Irving" ran into the punt. I saw Arkins; he was sitting on the bank opposite where the boat was. I saw the steamer coming in; there was a strong flood tide. It turned her bow in. I saw this and saw the boat, and I said to Arkins "You had better remove your boat, or you will get it smashed." He had plenty of time then to remove the boat. I have often seen the steamer miss the wharf as the "Agnes Irving" did. I have seen two of the steamers do exactly the same thing. I have seen them strike the punt. The punt is five feet from the water. I do not think the boat could have been seen from the steamer unless the captain was very observant and was looking that way. I could see from the way the steamer was coming in that the boat was in danger. I have seen the steamers strike against the punt, but not break the line or dash the punt against the shore. I never saw a boat there. I never saw a steamer dash against the punt so as to break a boat there. The steamer missed the wharf the first time. She was 30 yards out into the stream from the wharf. She went about 20 yards down-stream before she turned astern. The stern slewed lightly out into the river. She went astern and the tide seemed to have hold of her. She stopped going astern before she struck the punt. I swear she did not go ahead at all after going astern. I would not like to swear that if she had continued to go astern she would have avoided striking the punt. She did not come bow on to the punt; she came in a slanting direction. She did not strike the punt with her bow. She was not going so fast as to go through the punt if going bow on. If the boat had not been there nothing could have happened. I am not aware of any injury to the punt.

Joseph Jenkins confirmed the last witness.

Frederick Bracegirdle: I was commanding the "Agnes Irving" the day of the smash. The punt is five feet high from the water. I could not see the boat. There was a strong flood-tide. After getting abreast of the wharf, I went astern as usual with the engines. While getting the lines out the strong flood-tide canted the ship's bow against the punt. The starboard side of the bow bumped the punt. I was sure the punt could not be injured from the way the steamer was going. I did not see the boat. If I had not called at the wharf at all I think the wash of the steamer would have driven the punt against the boat. I believe the boat is about five feet beam. The punt might be about 20

tons. She was very thin, and the least way on the steamer would have damaged her. I have frequently had to move the punt. No one who knew anything about a boat would leave her there. When coming alongside the wharf I stand on the paddle-box. That is about 12 feet above the water; my eyes would be about 17 or 18 feet above the water. I was standing on the starboard paddle-box. I turned astern just as I got abreast of the wharf. I did not continue to turn astern up to the time of striking the punt. I am always in a hurry to get down to the bar; not in a particular hurry that day; I was not late for the bar. I used every due precaution to bring the steamer to the wharf properly.

Pilcher. The evidence shews that this was a mere accident. There was no affirmative evidence of negligence on the part of the defendants' servants, nor was it shewn that they had omitted any reasonable precautions. The accident was plainly caused by the strong tide canting the vessel's head round, and not by any negligence of those on board. *Hammack* v. *White* (*b*) shews that the mere fact of an accident happening is not even *primâ facie* evidence of negligence. The evidence is clear that the boat was in such a position that it could not be seen from the steamer. Then the plaintiff had only himself to blame for the accident, as he put his boat in an unsafe position.

PER CURIAM (*c*). The boat appears to have been lying at a wharf well within the line of the wharf at which the steamer used to stop. It was quite lawful for the plaintiff to put his boat there, and the defendants had no right to expect it to go out of the way of their steamer. It is said that this was an unavoidable accident caused by the strength of the tide, and that there was no evidence of negligence. But though the mere happening of an accident is not even *primâ facie* evidence of negligence, here we have the fact deposed to by some of the witnesses that the steamer came bow-on to the punt. That was certainly some evidence of negligence to go to the jury. Questions of negligence are always to a great extent matters of opinion, and are peculiarly for the jury to determine. There is no sufficient evidence of contributory negligence on the part of the plaintiff.

Rule refused.

Attorneys for defendants—*Daintrey & Chapman.*

(*b*) 11 C. B. N. S. 588; 31 L. J. C. P. 129. (*c*) Sir JAMES MARTIN, C.J., HARGRAVE and FAUCETT, JJ.

EX PARTE ADAMS. (a)

Small Debts Act (10 *Vic., No.* 10)—*Infant suing in detinue.*

An infant cannot sue under the 18th section of the Small Debts Act to recover damages for the detention of goods.

Pilcher moved to make absolute a rule *nisi* for a prohibition to restrain further proceedings in an action in the Small Debts Court at Bathurst, in which the applicant was defendant. The complainant in the Court below was an infant, and the action was brought to recover damages for the detention of some sheep. Section 18 of the Small Debts Act (10 Vic., No. 10), which gives jurisdiction to the Justices to hear certain complaints of infants, is in the following terms: "In every case where any wages or other sum whatsoever not exceeding the sum of ten pounds shall be due to any person under the age of twenty-one years, it shall be lawful for such person to sue for and recover such debt in any of the said Courts of Petty Sessions in the same manner as if he were of full age." It is contended that the amount here sought to be recovered was neither "wages," nor "a sum due," nor "a debt."

No counsel appeared for the respondents.

PER CURIAM (b). Rule absolute without costs.

TWADDELL v. DRIVER.

Action on award—Reference by Government to Arbitrators to ascertain sum to be placed on the Estimates—Award directing payment by Government—Ultra vires.

It was resolved by the Legislative Assembly that an address should be presented to the Governor, praying that His Excellency would be pleased to cause to be placed on the Estimates for 1874 a sum of money, to be ascertained by arbitration, to compensate the plaintiff for damages sustained by him. The Governor accordingly directed a reference, and the arbitrators awarded "that there be paid by the Government to the said James Twaddell [the plaintiff] the sum of £4600 for damages sustained by him." The plaintiff now brought an action of debt upon the award against the Government.

Held, on demurrer, that the award was *ultra vires*, and that the plaintiff's declaration could not be supported.

DECLARATION. James Twaddell, by T. B. Rolin, his attorney, sues Richard Driver, who has, in pursuance of the provisions of the statute in that behalf, been duly appointed by the Governor, with the advice of the Executive Council, to be a nominal defendant, for and on behalf of the Government of this colony, in the matter of the plaintiff's petition in regard to his claim and

(a) December 15. (b) Sir JAMES MARTIN, C.J., and HARGRAVE, J.

demand against the said Government; for that previously to and at the time of the passing of the resolution of the Legislative Assembly and the direction by the Governor, with the advice of the Executive Council, to submit the matter to arbitration thereinafter mentioned, the plaintiff had presented his petition to the Legislative Assembly of the colony praying for, and he was claiming from the Government, compensation for damage sustained by him by reason of the loss of the use of the station called "Droubalgie" and "Back Droubalgie," held by the plaintiff under lease from Her Majesty, by reason of the proclamation of a gold-field and the settlement thereon of large numbers of persons digging and searching for gold, and also damage from the depreciation of the plaintiff's cattle grazing thereon, and the destruction and entire loss of large numbers of such cattle, and thereupon it was, on the 4th of November, 1873, resolved by the Legislative Assembly that an address should be presented to the Governor, praying that His Excellency would be pleased to cause to be placed on the Estimates for 1874, a sum of money to be ascertained by arbitration to compensate the plaintiff for damages sustained by him; such compensation having been recommended by the report from the Select Committee brought up on the 17th day of March, 1873. And the Governor, with the advice of the Executive Council, directed a reference of the said matters to arbitration; and the same was directed by the proper officer in that behalf of the said Government to be conducted in the manner prescribed under the 23rd section of the Crown Lands Occupation Act of 1861; and the plaintiff assented and agreed to such arbitration. And Her Majesty's Secretary for Lands for the said colony, being the proper officer of the said Government in that behalf, on the 6th day of December, 1873, duly appointed one Whittingdale Johnson to be the arbitrator of the said Government in the said matter, and the plaintiff, on the 11th day of December, 1873, duly appointed one Solomon Meyer to be the arbitrator for the plaintiff in the said matter, and the said Whittingdale Johnson and Solomon Meyer took upon themselves the said reference and duly appointed Thomas Lee to be umpire; and the said arbitrators did within the proper time in that behalf, according to the provisions of the Crown Lands Occupation Act of 1861, duly make and publish their award in the said matter in the words and figures following, that is to say: [The award recited the resolution of the Legislative Assembly, the direction of the Governor, the appointment of the arbitrators and umpire, the operative words being as follows: "Now we, the said arbitrators . . . . . make and publish our award in writing of and concerning the matters above referred to us in

manner following, that is to say: we award and adjudge that there be paid by the Government to the said James Twaddell the sum of £4600 for damage sustained by the said James Twaddell in consequence of his runs in the pastoral district of Wellington being trespassed upon by large numbers of persons in search of and digging for gold under the authority of the Crown in 1861, and loss of cattle in consequence of the said trespasses." The rest of the award related to the payment of fees, and is immaterial.] Yet the said Government has not paid to the plaintiff, or any one on his behalf, the said sum of £4600, or any part thereof, and the same remains wholly unpaid and unsatisfied.

DEMURRER on the ground that the alleged award was beyond the submission, inasmuch as it appears by the said Court that the Minister for Lands had power only to submit to arbitration the question what sum should be placed on the Estimates for 1874 by way of compensation, and which was, in fact, as the said cause shews, the question submitted, whereas, by the said award, the amount that should be absolutely paid by the Government to the plaintiff was determined.

M. H. Stephen, for the defendant, in support of the demurrer. The declaration cannot be supported. There is no liability to pay the amount awarded. The only reference being as to what sum should be placed on the Estimates, there can be no claim on the Government till the Estimate is passed.

Butler, Q.C. (*Davis* with him), for the plaintiff. The plaintiff had a legal right under section 3 of the Gold Fields Act then in force (16 Vic., No. 43) to compensation, "such compensation to be ascertained by valuers or an umpire" appointed in a certain manner. Having this legal right, he did not lose it by petitioning the Legislative Assembly, nor did their resolution affect it. The matter referred to the arbitrators was the amount of compensation which the plaintiff was entitled to receive, not as a favour, but as a matter of right under the Gold Fields Act. The reference admits that some amount is due, and only requires the arbitrators to fix that amount. The dispute between Twaddell and the Government was not what sum should be put on the Estimates, but what sum should be paid to him as compensation. And this was the matter referred. *Charleton* v. *Spencer* (*b*) shews that the recital of the resolution of the Legislative Assembly will not restrict the general effect of the submission. It was there said: "The recital merely indicates the motive of the submission; it does not limit the arbitrators' power; and there is nothing unreasonable in referring claims other than that which formed the original inducement to refer."

(*b*) 3 Q. B. 693.

Here, too, the authority of the arbitrators was not limited by the recital of the resolution of the Legislative Assembly that a sum should be put on the Estimates when ascertained by arbitration. Besides, if a sum is stated to be due, it is of no consequence whether it is to be paid in a particular way or out of a particular fund. *Scott* v. *Lord Ebury* (*c*) is an authority in point. It was there held that a promise to pay out of certain calls to be made upon shares might be sued upon as a simple promise to pay, notwithstanding the fact that no calls had been made. What *Willes*, J., says in his judgment is applicable to the present case:—"Suppose a farmer were to borrow money to be repaid when he sold his crop of hay, and, after a lapse of a reasonable time for effecting a sale, the ricks were burnt down, would he be excused from repaying the loan? Or suppose goods in course of transit to be sold, to be paid for on arrival, and they are lost on the way, could it be contended that the non-arrival of the goods would be an answer to an action for the price? I need hardly say it would not. In each of these cases it is simply a provision for the *time* of payment." And *Montague Smith*, J., says: "I entirely agree in the construction put upon the contract by the rest of the Court, that the money was to be repaid out of the calls on shares; but that if there were no shares, and no calls were made within a reasonable time, the liability of the defendant became absolute." So, in this case, the money was to be paid out of money specifically appropriated and voted by Parliament, but if there were no such vote within a reasonable time, then the Government is bound to pay it out of the general revenue. [Sir W. MANNING, J.: Your declaration is founded on the direction of the arbitrators that the Government should pay. If that is *ultra vires* and bad, does not your declaration fail?] No, because it is only necessary to aver in the declaration that the arbitrators found a sum to be due. And even if the direction to pay was *ultra vires*, still the award is only bad for the excess, and the Court will hold it good so far as it finds a sum to be due: *Johnstone* v. *Cheape* (*d*). Suppose instead of the words "that there be paid by the Government to the said James Twaddell" are substituted "that there is due to the said James Twaddell," the award would be perfectly good, and the plaintiff's cause of action would be complete. The Gold Fields Act gave him the right to some compensation, and the amount has been determined by an arbitration, assented to by the Government.

Stephen was not called upon in reply.

HARGRAVE, J. I am clearly of opinion that the demurrer must be upheld. There is a third party mentioned in this reference

(*c*) L. R. 2 C. P. 255. (*d*) 5 Dow. 247.

On the face of the plaintiff's own declaration it is alleged that there was a resolution of the Legislative Assembly that "an address should be presented to the Governor praying that his Excellency would be pleased to cause to be placed on the Estimates for 1874 a sum of money, to be ascertained by arbitration," by way of compensation to the plaintiff. Here is an act done by a third party, the Legislative Assembly, and we cannot ignore the rights of that body in this matter. The plaintiff himself says that he asked for a sum to be placed on the Estimates, and that the sum might be ascertained by arbitration. How can we cut out these words "to be placed on the Estimates," as we are asked to do? The matter went to arbitration, and I cannot understand how the gentlemen who conducted the arbitration could have rejected words which were before their minds at the time, as is clear from the recitals to the award. I think the arbitrators have completely gone out of the scope of the reference, and that their award is utterly void.

FAUCETT, J. I am also of opinion that this demurrer should be allowed. I am not prepared to say that the award is altogether bad or a nullity; it seems a sufficient award for the purpose of the reference. But I am of opinion that the arbitrators have gone beyond the reference. The award is good for the purpose of enabling the Government to fix the sum to be placed on the Estimates, but has no further operation. Mr. *Butler* in his argument seems to be confounding two things—the motive of the reference and the object of the reference. The motive of the reference was to enable the Government to place a sum on the Estimates; the object was to ascertain what the sum should be. It is said that the plaintiff had a clear legal claim against the Government under the Gold Fields Act. But there is no statement of that kind in the declaration, nor is it admitted in the reference. The reference cautiously avoids any statement that Twaddell was entitled to anything, and the sole object of the reference is to ascertain what sum ought to be put on the Estimates. If the arbitrators had said, "We award that the sum ought to be so much," that would have been within their powers. Then again the Assembly is not bound by the previous resolution; the Estimate may be struck out, and there is nothing whatever to bind the Crown to a payment of that amount until the Estimate is passed. The excess therefore is clearly bad and ought to be taken *pro non scripto*. I agree that if this had been a reference between the Government and Twaddell to ascertain what sum was *due* by the Government to Twaddell, the Government would have been bound, and it would have been immaterial out of what fund the amount would have to be paid; but the putting a sum

on the Estimates is very different from merely fixing a particular fund, and the cases which Mr. *Butler* has cited have no application.

Sir W. MANNING, J. I feel no doubt that this declaration cannot be supported. At the same time, I think the award is perfectly good so far as it ascertains the amount referred to the arbitrators, and that the Government is entitled to put that sum on the Estimates, and to bring it before Parliament. But the arbitrators have gone beyond the reference in directing that the Government should pay, and that is the very part of the award on which the declaration is founded. No doubt, if the plaintiff had brought an action under the Gold Fields Acts, and a reference had been made of all matters in dispute in the action, the direction to pay would have bound the Government. But that is not the case here. The plaintiff did not rely on his legal claim, if he had one, but preferred a parliamentary inquiry. A select committee was appointed and, in consequence of their report, a resolution was carried in favour of an address to the Governor, praying that a sum, to be ascertained by arbitration, should be placed on the Estimates. Politically, such an address is considered as binding on the Government, because, if the Government does not act upon it, the House may pass an adverse vote, but it is not binding legally. There is no legal obligation on the Executive to comply with the prayer of the address. However, the Government did act upon it so far as to refer the matter to arbitration. But when the award came back the Government had a right not to put the sum awarded on the Estimates. It was not legally compulsory on the Government to do it. But suppose it was done, the Assembly need not vote the amount so placed on the Estimates, and even if the amount were voted in the Assembly, there must be an appropriation by the whole Parliament, and the assent of the Governor on behalf of the Queen, before the amount would become legally payable. If this action were founded on a legal right in the plaintiff under the Gold Fields Act, it might have been different; but here the plaintiff, instead of going into a Court of law, has chosen to resort to parliamentary action. And the regular course of parliamentary action has several stages yet to be passed through before payment of the money by the Government can be compelled.

Judgment for the defendant.

Attorneys for the plaintiff—*Rolin & Salter.*

Attorney for the defendant—*Williams* (Crown Solicitor).

THE QUEEN *v.* CUNIS JOURDAIN AND MADDALENA CROTTI. (*a*)

Criminal Law—Married Woman—Presumption of Coercion—Evidence of Independent Activity.

Subsequent acts of a woman who receives stolen goods from her husband are not evidence to shew such independent activity on her part at the time of receiving the goods as will rebut the presumption that she was acting under the coercion of her husband. (*Dubitante*, Sir W. MANNING, J.)

Whether the presumption is conclusive, *quære*.

CASE reserved for the opinion of the Court under 13 Vic., No. 8.

"The above named women were tried before me at Darlinghurst, on the 14th November, upon an information charging them and two men named Paul Jourdain and Giuseppe Crotti with stealing and receiving money (£816) the property of Giovanni Baptista Gatturno, at Sydney, on the 8th of August last.

The two men were convicted of the larceny, and the women were found guilty of receiving the money, knowing it to have been stolen.

The women assumed to be the respective wives of the men, and, although there was no strict evidence of the relation, the Attorney-General consented to recognise it, and it consequently became a question whether they were not within the protection founded on the presumption of coercion by their supposed husbands.

At the close of the case Mr. *Cohen* of counsel for them submitted that there was no such evidence of independent activity on their part as could be submitted to the jury in rebuttal of the presumption. I thought otherwise, and left the matter to the jury.

After the jury had retired, Mr. *Cohen* urged upon me that the necessary activity of the women must have been concurrent with the act of receiving the money, and that there was no evidence to that effect, and on my ruling that the jury were at liberty to infer such concurrent activity from the conduct of the women shortly after the secret receiving, he requested me to reserve this last point for the Court. I reserved it accordingly.

In considering the question thus raised, it may be necessary to refer to my notes *in extenso*; but I think that the following statement of facts may suffice.

The four prisoners, who are all foreigners, appear to have come to this country together, without families or other companions, a

(*a*) November 30.

few weeks before the offence in question, and they took a house for their joint occupation about three weeks previously, and there they lived together during that time. Shortly after their arrival the man Jourdain introduced himself to prosecutor as a fellow-countryman from Italy, and ingratiated himself with him in that character, and as a probable purchaser of his business as a die-sinker, on his intended retirement on a small fortune. At the expiration of this time the man Crotti introduced himself as an Italian, and a stranger to both Jourdain and the prosecutor; and they began a deliberate scheme of contrivances by which the prosecutor was induced to draw £816 from the Oriental Bank, and to expose it in a way which gave the two men the opportunity of committing the larceny. This was completed at about half-past twelve on the 8th of August.

The money so drawn out by, and stolen from, the prosecutor was composed of two £100 notes, thirty £20 notes, with smaller notes amounting to £16, all of the Oriental Bank.

In an hour after the theft was completed, that is to say, at half-past one of the same day, the woman Jourdain presented at the Oriental Bank fifteen of the £20 notes, and demanded payment for them, and thereupon three hundred sovereigns were given to her. The cashier's curiosity or suspicions were excited, and he watched her as she left the bank, and saw that she was joined by another woman, whom he afterwards recognised as the woman Crotti, and with whom she walked away. Not long afterwards the woman Crotti came to the bank with the other fifteen £20 notes and also demanded gold for them. The cashier, becoming more suspicious, referred to his superior officer, and the result was that payment was refused. The woman Crotti then left with the notes and was watched and followed by the cashier, who presently saw her joined by the woman Jourdain, with whom she walked away.

Later in the day the woman Crotti applied to a shopkeeper to change two of the £20 notes for gold, and another for change of a third note, both which requests were complied with.

On the following day all the prisoners were found by detective officers at the Grafton Wharf, some of them being about to embark in the "Rotorua" for New Zealand. The two women came from the steamer and the men were awaiting them in a public-house near the wharf. One of the women (Crotti) acknowledged to some baggage which was on board the steamer and contained both men's and women's apparel, but it was not ascertained who were really going off. It may, however, be readily surmised that the Jourdains were going, as they had on their persons about one-half of the plunder, and of the other money of the party, whilst

the other half remained at the house in which the four had resided.

All four were arrested, and on being asked to shew what they had about them, the man Crotti produced £71 17s. 3d., and the man Jourdain produced £77 3s. 5d. The woman Crotti gave up £7 14s. 6d., and the woman Jourdain produced £1 11s. 1d., and on her hand were three diamond rings. All denied that they had any more.

They were then taken to the Water Police lock-up. Nothing further was found on the men, and the female searcher was sent for to search the women. She first searched the woman Crotti, and found only £1 2s. on her. She then called on the woman Jourdain, who as she went out of the common room handed her parasol to the woman Crotti. Presently a paper was seen to drop from the parasol, and on being picked up was found to be a £100 Oriental Bank note, and inside the parasol were six £1 notes. In the search room the woman Jourdain at first denied having any money about her, but afterwards disclosed a sort of belt round her waist in which were two hundred and seventy sovereigns.

One of the women gave up to the police two keys, of which one was stated to be the outer door key of the house in which they had resided, and on the 11th the house was opened with that key and searched. In a palliasse in one of the rooms there were found the remaining £100 note and the remaining twelve £20 notes of the Oriental Bank, also sixty sovereigns, nineteen £1 notes of another bank, and some American gold coins and notes.

The whole amount taken was about £140 (independently of the foreign money) in excess of the sum stolen from Gatturno, but the jury must be taken to have been satisfied with the identity of the two notes for £100 and the thirty notes for £20, and of the gold as being the produce of such of the notes as had been exchanged.

It is material to add that the place of residence occupied by the four prisoners was near the Haymarket, whilst the spot at which the male prisoners got away with the prosecutor's money was at the corner of Bent and Phillip streets, a distance of probably not less than a mile. These facts are important in connection with that of the two women being at the bank (one within and the other outside) in so short a time after the theft.

The jury must be taken to have found that the women received the money with knowledge at the time that it had been stolen, as I had directed them to the effect that this was necessary. And they must also have found that there was in fact an independent activity on the part of the women, as I had told them

that this was necessary on account of their supposed relations to the men; and I do not understand that the principles which I laid down on the latter point are questioned in the reserved point. The question is whether there was any sufficient evidence to go to the jury of activity concurrent with the time of receiving the money from the men; but perhaps the Court may think it right to review the whole case as regards these women in reference to the principle of protection by reason of the presumed coercion.

W. M. MANNING."

Foster appeared for the Crown, in support of the conviction; *Cohen* appeared for the prisoners.

Cohen. The offence of receiving was complete when the money was received by the women from their husbands, and nothing that happened afterwards could alter the quality of the act. Thus it must be proved that a prisoner, at the time he received the goods, knew them to be stolen. Ignorance at the time, even if he subsequently acquires knowledge of the theft, will excuse him. So here the independent activity which is necessary to break down the presumption of coercion, must be manifested at the time. In this case there is evidence of subsequent independent activity, but there is absolutely no evidence either one way or the other of the circumstances under which the money was received by these women. *Brook's case* (*b*) is exactly in point. There, as here, there was no evidence whatever of the circumstances of the receipt, but there were acts afterwards shewing a guilty knowledge. That case is referred to in *Russell on Crimes* (*c*), where the learned editor says of it: "This decision is clearly right on the ground that there was no evidence whatever as to the guilty knowledge or conduct of the prisoner *at the time the goods were received.*" In *Rex* v. *Knight* (*d*), it was held by *Park*, J., that "if a man and his wife jointly commit a felony, the wife, being presumed in law to be under his coercion and control, is entitled to an acquittal." *Rex* v. *Archer* (*e*), seems to be to the same effect, viz., that a wife cannot be found guilty of a felony committed in her husband's presence. [*Reg.* v. *Buncombe* (*f*), and *Reg.* v. *Cruse* (*g*), were also referred to.]

Foster, for the Crown. The facts in this case are almost identical with those in *Reg.* v. *McLarens* (*h*). There was no evidence to shew the circumstances under which the wife received the stolen property, but *Coltman*, J., told the jury that "if the husband received the property, knowing it to be stolen, and if the wife received it from him with a like knowledge and with the

(*b*) Dears. C.C. 183. (*c*) Vol. I., p. 36. (*d*) 1 C. & P. 116. (*e*) 1 Mood. C.C. 143. (*f*) 1 Cox C.C. 183. (*g*) 8 C. & P. 541. (*h*) 3 Cox C.C. 435.

purpose of aiding and assisting him in the object he had in view in receiving it, by turning it to pecuniary profit or in other like manner, although *prima facie* she might be supposed to be acting under the coercion of her husband, that was rebutted by the active part which she took in the matter with the intention above mentioned." In *Reg.* v. *Cohen* (*i*) it was held that if a wife acted voluntarily, even in the presence of her husband, she was liable to punishment. The presumption of coercion may be rebutted by anything which goes to shew voluntary action on her part. Thus a married woman who swore a false affidavit in the presence of her husband was convicted of perjury.

Sir JAMES MARTIN, C.J. In this case two male prisoners and two female prisoners were indicted on an information containing two counts, one for stealing certain money and the other for receiving it knowing it to be stolen. The jury found the two males guilty of stealing and the two females guilty of receiving. According to the case stated to the Court it by no means appears to have been proved that the females were the wives of the male prisoners; but the Attorney-General so conducted the case as to allow the fact that they were married to be taken for granted. In all probability they were not their wives at all, and if that point had been contested his Honor would have otherwise directed the jury.

The evidence shews that the money was taken by the male prisoners when their wives were not present; but shortly afterwards the wives are found going to a bank, trying to get the stolen notes changed into sovereigns, and doing other things which lead irresistibly to the conclusion that they knew the money was stolen. There was no evidence tending to shew the circumstances under which they became possessed of the money. His Honor held that the subsequent actings of the female prisoners were sufficient evidence to go before the jury to enable the jury to consider whether at the time of receiving the money they were acting independently of their husbands, treating the presumption of marital coercion as a presumption of law which might be rebutted by evidence. The question now for our consideration is whether his Honor was right.

I am of opinion that his Honor was in error in so holding, and that the conviction cannot be supported. It is quite true that the opinions expressed by Judges in England in the different cases cannot be reconciled; but we must go by the weight of authority. There are only four decisions which bear directly on the point before us. The first case was decided in 1824, and the last in 1860. First came the case of *Rex* v. *Archer*. The marginal

(*i*) 11 Cox C.C. 99.

note in the report is as follows:—"Upon a joint charge against husband and wife of receiving stolen goods, the wife cannot properly be convicted if the husband is." There the wife was found dealing with the stolen goods in such a way as to shew guilty knowledge, and the Judge told the jury that if the wife appeared to have taken an active and independent part, and to have endeavoured to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offence. The prisoner was found guilty, but the case was afterwards submitted to the opinion of all the Judges, and they held that "as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of her husband, the conviction could not be supported, though she had been more active than her husband." Now that case seems to shew that under no circumstances can the crime of felonious receiving be committed by a wife jointly with her husband. If he be present at the time of the commission of the offence, the presumption that the wife was acting under his control and coercion is conclusive.

Ten years afterwards was the case of *Rex* v. *Price*. That decision seems to lead to exactly the same conclusion as *Rex* v. *Archer*.

In 1853 *Brook's case* was decided. [His Honor read the report in full.] There were subsequent acts shewing guilty knowledge on the part of the prisoner, but no evidence to shew the circumstances under which she received the stolen property from her husband. The decision seems to follow the principle established in the two other cases to which I have referred.

The other case is *Regina* v. *Wardroper* (*j*), to which I called the attention of counsel during the argument. The facts there were very similar to the present. The only evidence against the female prisoner was that she had been found dealing with the stolen property and using it after the theft had been committed, and it was held that the Judge ought to have left it to the jury to say whether she received it from her husband, and, if not from him, whether she received it in his absence.

We are not now called upon to decide that under no possible circumstances can a married woman who receives stolen goods from her husband be convicted of felonious receiving, though the cases certainly seem to go that length, and to treat the presumption of coercion as conclusive. We are only called upon to say whether subsequent independent acts shewing a guilty knowledge are evidence of the female prisoners having taken an active and

(*j*) Bell C.C. 249.

independent part in the commission of the felony. I think they were not evidence, and that this conviction must be set aside.

HARGRAVE, J. I concur with his Honor the *Chief Justice.* I think his Honor Sir *W. Manning* was quite right in letting the case go to the jury subject to the point of law reserved. Where there is a doubtful point such a course is the best for the interests of justice. Now we have this fact, that up to the date of the receiving there was nothing to connect these women with the stolen property. The evidence shews, and the jury have found, that they took no part in the stealing. There is no evidence to shew any independent action on their part up to the time that they tried to pass the notes at the Oriental Bank. Then comes in the rule of law that a wife is not to be found guilty of such crimes as receiving, if she receives from her husband. It is not strictly a presumption of criminal law; it is an incident of coverture at common law. The wife is not supposed to have any right to ask her husband how he came by money or goods which he gives her. If the actual receiving had been an independent act, and if the woman had received the money from a stranger, the fact that they were married would not excuse them. But here all the independent acts were long subsequent to the time when the money must have been received. That the rule as to coercion is not a presumption of law but arises out of the marital relation, appears from the fact that it only extends to one class of cases. Where the wife has a will of her own, and may be supposed to act independently, the rule does not hold good. Thus in the case of perjury, a wife has been convicted of taking a false oath, though it was done in the presence of the husband. In the same way coercion is no excuse for acts which are *mala in se*, such as crimes of violence, murder, treason, &c. But in the ordinary transactions of life, such as dealing with goods or money brought into the house by the husband, or, as in this case, taking notes for change, it is necessary, for the sake of the domestic relations of husband and wife, to protect the wife, even if she has suspicions about the way the property has been come by, and acts in a way to shield her husband if there should be anything wrong.

Sir W. MANNING, J. I concur to this extent with the other members of the Court, that I think that these women ought to be discharged. I put it very strongly to the jury that the presumption was that they were acting under coercion; and I told them that proof of independent action on their part ought to be made out most distinctly. But I must not be taken at all to decide that the presumption of coercion is conclusive. My strong impression is that it is subject to be rebutted by evidence.

Moreover, in this case, though the Attorney-General admitted the fact of their marriage, I have myself strong doubts upon the point. The presumption could not have been made at all if the marriage had been contested, for if the question had arisen, the fact of the men and women having lived together in the same house for a few days would not be even *primâ facie* evidence of their standing in the relation of husbands and wives. One of the women at first gave a different name, and the jury probably came to the conclusion that these people were a travelling gang of marauders, that they were all acting in concert, and that there was really *in fact* no coercion at all.

Though I did not expect that the jury would convict the women on the evidence before them, I am still strongly of impression that there was evidence to go to the jury. It is surely not necessary to have witnesses who were actually present at the time of the receiving to shew the circumstances under which it took place. The jury can always infer what took place at the time from what happened almost immediately afterwards. At the same time I doubt very much whether the evidence against the women was sufficient to justify the verdict, and the prisoners are entitled to the benefit of that doubt.

Conviction set aside. (*k*)

Attorney for the prisoners—*D. L. Levy.*

TRIMBLE *v.* HILL. (*a*)

Wagering Contract—14 *Vic.*, *No.* 9, *Section* 8.

Under an agreement between the plaintiff and one G., £200 was deposited with the defendant as stakeholder to abide the event of a hurdle race between two horses owned by the plaintiff and G. respectively, with a condition that unless the whole stake was made good by a certain day the deposit should be forfeited. The plaintiff, before the day fixed for the match, declared it off, and sued for a return of the deposit. The District Court Judge held that the transaction was protected by the proviso to the 8th section of the Act 14 Vic., No. 9, and nonsuited the plaintiff.

Held (*per* HARGRAVE and FAUCETT, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that the District Court Judge was right.

Hogan v. *Curtis* followed; *Diggle* v. *Higgs* not followed.

APPEAL from the Metropolitan and Coast District Court holden at Sydney. The case stated by the learned District Court Judge was as follows:—

This is an action in which the plaintiff sued the defendant to recover the sum of £200 under the following circumstances. In

(*k*) *Foster* stated in reference to some remarks in their Honors' judgments, that documents were produced by the prisoners' counsel at the trial, which, though not legally admissible as evidence, fully satisfied him that the male and female prisoners had been lawfully married. (*a*) December 13.

April, 1877, the plaintiff and one Glenister entered into an agreement in the words following:—

"April 4th, 1877.

"Mr. Glenister agrees to run Gaffer Grey against Mr. Trimble's Beacon for the sum of £500 a side, £200 of which is deposited in the hands of George Hill, which said deposit money will be forfeited unless the whole of the stake is made good on Monday evening, the 10th day of April, between the hours of 8 p.m. and 10 p.m. The race to take place on Tuesday, the 11th day of April, between the hours of 3 and 4 o'clock p.m. The race to be the same weight and same distance and same hurdles as they met in the A.J.C. Hurdle Race.

TULIP GLENISTER,
JOSEPH TRIMBLE.

"Witness—Edwin Gough."

And upon the same day the plaintiff and Mr. Glenister paid to the defendant as a deposit under the said agreement the sum of £200. After the making of the said agreement, and several days before the day fixed for the race, the plaintiff's wife died, and he applied to Mr. Glenister either to give up the race or to postpone it, which application was refused. Subsequently, and before the day fixed for the said race, the said Mr. Glenister applied to the plaintiff to postpone the day for running the said race for one day, because the day originally fixed under the said agreement was also the day fixed for the opening of the exhibition. To this request the plaintiff agreed. Afterwards, and before the day fixed for the said race, and before the said race was to have been run, viz., on the 9th of April, 1877, the plaintiff wrote and sent to the defendant a notice in the words following:—

"Sydney, 9th April, 1877.

"To George Hill, Esq.

"Sir,—I hereby declare the match Beacon v. Gaffer Grey off. I give you notice not to pay over the amount £200 deposited by me with you, and I request that you will return the same to me forthwith.

I am, yours obediently,
JOSEPH TRIMBLE.

"P.S.—Mr. Glenister has been served with a copy of this notice."

The race was not run, and the plaintiff thereupon instructed his attorneys to write to the defendant, which they accordingly did in the words following:—

"11th April, 1877.

"George Hill, Junr., Esq.,
Bent Street, Sydney.

"Dear Sir,—We are instructed by Mr. Joseph Trimble to apply to you for a return of the sum of £200 deposited by him with you and referred to in his notice to you of the 9th instant. In the event of your declining to comply with this demand we shall hold you responsible for any loss our client may sustain and shall issue a writ against you for damages.

Yours truly,
CURTIS AND GANNON."

To this letter the following reply was sent:—

"13th April, 1877.

"Dear Sirs,—Mr. George Hill, Junr., has placed in my hands your letter to him of the 11th instant, with instructions to accept service of any process you may issue against him at the instance of Mr. Trimble.

Yours truly,
RICHARD DRIVER.

"Messrs. Curtis and Gannon,
Solicitors."

It was admitted at the trial that the defendant received the notice on the day before the day originally fixed for the said race; and whilst the money was in his hands, and that one horse was the property of the plaintiff. No evidence except what appears in the said written agreement was given as to the ownership of the horse raced by Mr. Glenister.

At the close of the plaintiff's case the defendant moved for a nonsuit, on the ground that the transaction was within the proviso to the 8th section of the Act 14 Vic., No. 9.

It was contended on behalf of the plaintiff that the agreement was silent as to the disposition of the money in any event, and therefore that the case came within the evils intended to be guarded against by the said 8th section; and that the transaction did not come within the proviso, as contended by the defendant, and therefore that the plaintiff was entitled to recover. The plaintiff also contended that the transaction was a wager and illegal.

After hearing argument, I decided that the case came within the proviso in the said 8th section, and that the plaintiff could not recover, and nonsuited the plaintiff.

The question for the opinion of the Supreme Court is whether I was right in so deciding and nonsuiting the plaintiff.

W. H. WILKINSON.

The section referred to is in the following terms:—All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always that this enactment shall not be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

Sir *George Innes* (*Pilcher* with him), in support of the appeal. If the Court is bound by a decision of the Supreme Court of Appeal in England, this case is concluded by *Diggle* v. *Higgs* (*b*), which is expressly in point, and decides that such a transaction as took place between these parties is a wagering contract, and void under the statute. That case expressly overrules *Batty* v. *Marriott* (*c*), which was followed by this Court in *Hogan* v. *Curtis* (*d*). But even if the Court is not bound by the superior authority of *Diggles* v. *Higgs*, the reasoning in that case is far more satisfactory. *Batty* v. *Marriott* has been disapproved and not followed in several cases, viz., *Parsons* v. *Alexander* (*e*) and *Batson* v. *Newman* (*f*), and is directly contrary to the previous decision in *Varney* v. *Hickman* (*g*), which was followed by the Court of Exchequer in *Martin* v. *Hewson* (*h*).

Butler, Q.C., for the defendant, in support of the nonsuit. The Court will abide by its own decision until there is a contrary decision in the Privy Council. That is the only tribunal whose authority is binding on this Court. The question was very fully considered in *Hogan* v. *Curtis*, and all the authorities up to *Martin* v. *Hewson* were cited to the Court. The Court took time to consider, and delivered an elaborate judgment, reviewing all the authorities, *Varney* v. *Hickman* among them. *Hogan* v. *Curtis* was decided in 1867, and has been acted on ever since, and the Court will not now reverse it in deference to the opinion of a Court whose decision is not binding. *Batty* v. *Marriott* was not disapproved in *Parsons* v. *Alexander*, but its authority was expressly recognised.

Sir *George Innes* in reply.

Sir JAMES MARTIN, C.J. This action was brought to recover a sum of money deposited to abide the result of a race between two horses. Before the race was run, notice was given by one of

(*b*) L. R. 2 Ex. Div. 422. (*c*) 5 C. B. 818. (*d*) 6 S. C. R. 276. (*e*) 24 L. J. Q. B. 277. (*f*) L. R. 1 C. P. Div. 573. (*g*) 5 C. B. 271. (*h*) 10 Ex. 737.

the depositors to the stakeholder to return the money; the money was not returned, and this action was brought. The District Court Judge nonsuited the plaintiff, and we have now to decide whether he was right or wrong in so nonsuiting him.

It seems that the Judge in the Court below came to the decision complained of on the authority of a case, *Hogan* v. *Curtis*, decided in this Court in 1867; and if there had been no later case decided in a higher jurisdiction, I should have felt bound on this appeal, whatever might have been my individual opinion on the point, to pronounce the same judgment as Judge *Wilkinson*. But, since the decision of this Court in *Hogan* v. *Curtis*, and even since the decision which is now appealed against, there has been a decision in the Supreme Court in England in the Appellate Division. I refer to the case of *Diggle* v. *Higgs*, which is directly contrary to the decision in this Court. *Diggle* v. *Higgs* is not a case decided in one of the divisions of co-ordinate authority which, under the new Judicature Act in England, take the place of the Courts of Queen's Bench, Common Pleas, and Exchequer, but in a higher Court, standing in a position equivalent to the Court of Exchequer Chamber, whose decision is binding upon all the three divisions. The question now is whether we ought to feel ourselves bound by that decision or should refuse to follow it, and refer the parties to the only tribunal whose decisions can actually bind this Court, the Judicial Committee of the Privy Council.

Looking into the different cases which have been decided upon the point now before us, I find the reasoning on which the case of *Hogan* v. *Curtis* was decided so entirely unsatisfactory, and the decision itself so opposed to the general current of authority at the time, that I feel myself justified in following the decision of a higher Court which I feel to be the *right* decision, as I will proceed to shew.

The section of the Act is in the following terms: [His Honor read the section]. The language of that section is identical with that of section 18 of the Imperial Act, from which our Act was copied; so that all that is said in the English cases about the English section will apply with equal force to our own. Now the first part of the section seems to me to make void all wagering contracts whatever, whether they are about things illegal, or things harmless and innocent in themselves, and perfectly legal at common law; in other words, to make all wagers illegal, do away with them altogether, prohibit their enforcement in Courts of law. The Legislature intended that, in future, there should be no controversy whether wagers were made about legal or illegal games. Before the statute a bet about a dog fight would have

been illegal; about a horse race legal. But the Legislature has now made them all unlawful and void. Now, the statute, having done this, goes on to enact what is quite unnecessary, as has been pointed out by Judges, viz., that no action at law or suit in equity should be maintained upon such unlawful contracts. Of course if such contracts are made void, no action could be brought to enforce them quite independently of the words of the statute, but those words (though unnecessary) shew more clearly the intention of the Legislature to put down all kinds of betting altogether. The proviso to the section shews that the Act was not intended to apply to certain things which have always been perfectly lawful at common law, and have never been prohibited by any statute. Thus, if a number of persons subscribe a sum of money, either to be awarded as a prize, or to purchase a prize, for a horse race, or some other lawful amusement, that is a transaction untouched by the statute. But it is the only thing protected.

Now the present agreement is simply a bet on one horse against the other. Can there be the slightest doubt in the world that it is a wager? The decision in this Court maintains that, and indeed the question did not require any decision. But then it is said that it comes within the proviso. I am of opinion that it does not, and that it is not (using the words of the statute) "an agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." It is an abuse of terms, and does violence to language to call it such—it is simply and purely a wager. But it is said that such an agreement was held to be within the proviso in *Batty* v. *Marriott*. It was so held in that case, but the language of the Judges who decided it is eminently unsatisfactory. In so speaking I am not saying anything which has not been often said already by other Judges. Lord Chief Justice *Wilde* says, "There may possibly be a difference when the money is not placed in the hands of a stakeholder. The difficulty is in saying when two persons and only two mutually agree to put down a stake, the whole of which is to be paid to the winner, in what respect that differs from a wager. At the same time we cannot, in construing this Act of Parliament, shut our eyes to what was passing in the world at the time the statute passed. Horse-racing, it is quite clear, was not intended to be discouraged; and many races run with horses are match-races, where the horse of one person runs against the horse of another for certain stakes to be awarded to the winner. The Act of Parliament clearly did not intend to prohibit such matches, which are within the express terms of the proviso." The *Lord Chief Justice* is not at all clear about the

matter, and Mr. Justice *Coltman* is still less clear. I am of opinion that the reasoning in that case is altogether erroneous, and that the contract there was a wagering contract, and was void under the first part of the section. Previous to *Batty* v. *Marriott* was the case of *Varney* v. *Hickman*, and it was followed by *Martin* v. *Hewson*. Both these were cases in which the proviso was not pointedly referred to; but still they were decisions that the depositor under a contract of this sort was entitled to recover his deposit. So that *Batty* v. *Marriott* is at variance with these two decisions of co-ordinate authority. After these came the case of *Parsons* v. *Alexander*. It is clear that the Court of Queen's Bench there disapproved of *Batty* v. *Marriott*. It was not overruled: a Court never overrules a decision of another Court if it can possibly be avoided; but it is distinguished. Then we have the case of *Batson* v. *Newman* in the Appeal Division of the High Court of Justice. I do not quite gather from the report that the Judges in that case disapproved of *Batty* v. *Marriott*; but from expressions in other cases, it appears that they were understood in England at the time to do so, although no expressions of dissent are reported. The last case is that of *Diggle* v. *Higgs*. Lord *Cairns* in his judgment goes through the section, and employs the same reasoning as I have just done. He says of *Batty* v. *Marriott*, "If that authority is to be followed it cannot be denied that it is a very strong authority for the defendant. What the Court had in their minds in that case was the question whether the game was a lawful or unlawful game, and, having come to the conclusion that it was a lawful game, they were of opinion that there was nothing in the case which was struck at by the Act of Parliament, and that the Act was only intended to strike at unlawful games. That view seems to me to be erroneous, and I think that the Court overlooked the first part of the section, which applies to all contracts, lawful or unlawful, by way of gaming or wagering. When *Batson* v. *Newman* came before this Court, although there was a certain degree of difference between that case and *Batty* v. *Marriott*, yet it is obvious that *Batty* v. *Marriott* did not meet with approval. I cannot follow that case." Believing that the reasoning in this case of *Diggle* v. *Higgs* is right, and that the decision of this Court was wrong, and finding now that there is a decision of an Appellate Court, by which Courts of co-ordinate jurisdiction with ourselves will be bound, I think that we ought to feel ourselves bound also. The Court that decided *Batty* v. *Marriott* will be bound by that decision. This Court in *Hogan* v. *Curtis* only followed the authority of *Batty* v. *Marriott*, and why should we not be equally bound? I think the nonsuit was wrong, and that this appeal should be allowed.

HARGRAVE, J. I must altogether differ from his Honor the *Chief Justice* on every point. First, as to the authority of the Appellate Court. It is not the highest tribunal, being inferior to the House of Lords. The House of Lords and the Judicial Committee of the Privy Council are the only two Courts of final appeal. But it is said that a decision of the Court of Appeal should be treated by us as a binding authority. I cannot agree to this. I do not think that we can do it consistently with our relation to the Privy Council. A proposal that appeals from the colonial Courts should be heard by the Appellate Court was brought before the English Parliament and rejected. The Imperial Parliament, therefore, in refusing to subject our tribunals to any other tribunal than the Privy Council, came to the conclusion that that was the only Court by whose decisions we ought to be bound. And the Appellate Court is not to be compared to the Judicial Committee in the broad views that that tribunal takes of the questions brought before it. Very eminent lawyers who have been Judges of colonial Courts sit on the Judicial Committee, and I think they are far more competent to decide questions of colonial law.

Next we come to the question whether the decision in *Hogan* v. *Curtis* was right or wrong. I think it was a perfectly right decision. Now, what are the different kinds of transactions in connection with horse-racing. First we have two people, as in the present case, each owning a horse, and making a match between them, and saying, "As a proof of my integrity and to pay the expenses of the match, and to make it worth your trouble to compete, I will put £100 in the hands of a stakeholder, you do the same, and the winner shall have the whole amount." Can anyone say that that is not within the proviso? Then, again, when not only the two persons interested but others also subscribe £100 and put it in the hands of the stakeholder to add to the stake to encourage clever training and a good breed of horses; nothing can be more lawful than such a transaction. Then comes a different state of things, where a person says, "I'll wager so much on such a horse or against such a horse." There no money passes at the time, and that is what the law understands, and what the public understands, by bets and wagers. The mischief at which the Act was aimed was the making of bets and wagers by people who have no money to pay if they lose, and then help themselves to money that does not belong to them. All the evils of betting would be cured if people had only to deposit their money at the time. That would be a clear proof of their integrity and their ability to pay.

All these questions were considered very fully in *Hogan* v. *Curtis*. The judgment in that case fully shews what are bets and wagers, as distinguished from the transactions protected by the proviso. I am perfectly clear that *Hogan* v. *Curtis* was a well-considered decision, and that we ought not now to depart from it.

FAUCETT, J. I am not prepared to follow the decision in *Diggle* v. *Higgs*. I must respect the Appellate Court, but it is inferior to the House of Lords, and with us cannot have the same authority as the Privy Council. We are not bound to alter our decisions in deference to the authority of that Court. Now in *Hogan* v. *Curtis* we have a clear decision of this Court upon the very point at question; a well-considered judgment, with the reasons written out at large. I entirely differ from his Honor when he says that this decision did not follow the currency of legal opinion at the time. It was based altogether on authority. Of course every decision of the Court is subject to be criticised afterwards and to be reviewed if we think necessary; but as a general rule we do not overrule decisions of long standing unless overwhelmed with the authority of English Courts. Here the decision has been acted on for the last ten years, and has never been questioned. I find, looking at the report, that there was not a single prior case that was not well considered by the Judges in their judgments. *Batty* v. *Marriott* was an authority at the time *Hogan* v. *Curtis* was decided, and was recognised as an authority by the Judges of the Queen's Bench in *Parsons* v. *Alexander*. And the only point that arises in the present case was considered and clearly decided in *Batty* v. *Marriott*. It is said that the language of the judgment in that case is not clear. I confess I cannot adopt that view. Lord Chief Justice *Wilde* was a Judge of great eminence, and he says "Here, two sums of £10 each having been deposited by two persons, to abide the event of a lawful race, the whole to be awarded to the winner, the case is clearly one which falls within the words of the proviso," I confess this seems to me very clear language, and very strong language. And Mr. Justice *Cresswell* says:—"A contribution to sweepstakes is clearly a wager; but, by the proviso, the prohibition or disqualification is not to apply to any subscription or contribution towards any plate or sum to be awarded to the winner of any lawful game. You cannot, from the words only, imply any limit to the number of subscribers or contributors. Though there are two subscribers only, it is not the less a contribution to a sum to be awarded to the winner of a lawful game, if the agreement be that the whole sum subscribed shall be paid over to the winner. The case falls clearly within the proviso. It might have been different if contribution to a *plate* only had been

mentioned; but the words are plate, prize, or sum of money." Whether right or wrong, that language seems sufficiently clear. With the reasoning in these cases, then, before this Court, it cannot possibly be said that *Hogan* v. *Curtis* was not following the current of authority at the time. I think, considering the number of these transactions that have taken place since *Hogan* v. *Curtis* was decided, our safest course is to adhere to our former decision until it is expressly overruled by the Privy Council. It follows that the decision of the Judge in the Court below was right, and that this appeal should be dismissed.

Appeal dismissed with costs.

Attorneys for the plaintiff—*Gannon & McLaughlin.*

Attorney for the defendant—*R. Driver.*

BUCKSTONE *v.* BENNETT. (*a*)

Security for Costs—Bond of Banking Corporation—Power of Directors to give such Bond—Practice.

The Prothonotary refused to approve of the bond of the Commercial Banking Company of Sydney, which was tendered as security for costs. *Held* (Sir W. MANNING, J., *dubitante*), that the Prothonotary was right.

It is not necessary to state the grounds on which a rule *nisi* is obtained where they necessarily appear on the face of the rule.

Darley moved to make absolute a rule *nisi* obtained by him last term. The rule as drawn up called upon the defendant to shew cause why the defendant should not accept as security for the costs of this action the bond of the Commercial Banking Company of Sydney, and why the Prothonotary should not approve of such bond, and why the defendant should not pay the costs of the rule. The grounds on which the rule was obtained were not stated, nor did the rule refer to any affidavit as containing the ground.

Butler, Q.C. (*M. H. Stephen* with him), took the preliminary objection that the rule as drawn up did not comply with the 18th Rule of Court of the 28th of February, 1856. He referred to *Ex parte Kearns.* (*b*)

Sir JAMES MARTIN, C.J. I do not think we can support the preliminary objection. No doubt the rule might have been drawn in a clearer way. We are left to infer that the Prothonotary has refused to approve of this bond and the grounds of his refusal, which, however, I think we can infer from the rule itself. There can only be one ground on which the rule can be asked for, and that is that the bond is a perfectly valid bond, and ought to be accepted as security. I think the grounds sufficiently appear on the face of the rule.

(*a*) November 30. (*b*) *ante*, p. 13.

HARGRAVE, J., and Sir W. MANNING, J., concur.

Darley. The only objection to this bond being given must be that the bank could not legally give such a bond, and might defend an action brought upon the bond on the ground that the bank had no power under their Act of Incorporation or their Deed of Settlement to give it. No express power to enter into such bonds is given by their Act, but there is nothing expressly prohibiting them; and I submit that the shareholders could not repudiate the action of the directors on the ground that the bond was *ultra vires* and void. The section of the Amending Act of Incorporation (27 Vic.) enacts "that it shall be lawful for the said corporation, subject to all the restrictions and provisions herein contained, to carry on the business of a bank of issue, discount, and deposit in the colony of New South Wales and elsewhere, and to make loans of money on cash credit accounts, promissory notes, bills of exchange, or letters of credit, and on any personal or other securities, and it shall also be lawful for the said corporation to deal in money, bullion, and specie, and in exchanges of and with all countries, and in notes, bills, or other securities for money, and generally to transact all such other business as it is or shall or may at any time hereafter be usual and lawful for establishments carrying on banking in all its branches, or dealing in money, bullion, or specie, and in exchanges, or in notes, bills, or other securities, to do or transact; and to establish agencies, branch-banks, or connections in relation to the said business in any of the adjoining colonies, or places, or in any part of the British dominions, or elsewhere, and to give letters of credit thereon for any purposes whatsoever; but that it shall not be lawful for the said corporation to advance or lend any money upon the security of lands, or houses, or ships, nor to own ships, and the said corporation shall not hold shares in its own stock, nor advance or lend to any shareholder or proprietor of shares in the said corporation any sum or sums of money on the security of his share or shares, nor invest, lay out, employ, advance, or embark any part of the capital or funds of the said corporation in the purchase of any lands, houses, or other real or leasehold property whatsoever (save and except as herein and in the said recited Act specially provided), nor of any share or shares in the capital or stock for the time being of the said company, nor in any trading or mercantile speculation or business whatsoever, not usually considered as falling under the ordinary and legitimate purposes and operations of banking establishments."

Young v. *The Brompton Waterworks Co.* (*c*) is a direct authority that a corporation can give a bond as security for costs, although

(*c*) 1 B. & S. 675; 31 L. J. Q. B. 14.

it might not have power to make ordinary money bonds. In principle that case cannot be distinguished from the present. The authorities on the subject of the powers of corporation is collected in a recent text book, *Brice on the Doctrine of Ultra Vires*. The editor sums up the decisions as follows (*d*):—"The result then of the English authorities is that corporations—certainly those for commercial purposes, and probably all corporations to which the doctrine applies—have by implication all capacities or powers which, being reasonably incidental to their enterprise and operations, are not forbidden them expressly by their constating instruments or by necessary inference therefrom." In *Chambers* v. *The Manchester and Milford Railway Co.* (*e*), *Crompton*, J., held that "a corporation is bound by the seal being affixed to the deed, where the directors have power given to them so to affix it, but that it is not bound when the Legislature has said that the thing shall not be done." In *The Eastern Counties Railway* v. *Hawkes* (*f*), Lord *St. Leonards* said, "The decisions do hold companies bound by contracts duly entered into by their directors, for purposes which they have treated as within the object of this Act, and which cannot be clearly shewn not to fall within them." In *Taylor* v. *The Chichester and Midhurst Railway Co.* (*g*), *Blackburn*, J., says:—"I think we are entitled to consider the question to be, not whether the present defendants had, by virtue of the Acts of Incorporation, authority to make the contract, but whether they are by those statutes forbidden to make it."

And this statement of the law was adopted by the House of Lords on appeal. The giving of this bond is not prohibited either expressly or by necessary implication. It is not within the power of a bank to undertake such proceedings for a customer in England, who cannot be present to give a bond himself, and who has no other representatives in the colony? But even if the Court think that the bond might be open to question, still it is in the discretion of the Court whether a plaintiff shall be compelled at all to give security for costs: *Chitty's Practice* (*h*); and if it is clear to the Court that the bank is willing to give the bond and that there is not the slightest probability of it being repudiated, the Court will say that it is sufficient security.

Butler, Q.C., and *Stephen*, for the defendant, were not called upon to shew cause.

Sir JAMES MARTIN, C.J. In this case the defendant is sued by a person resident out of the jurisdiction, and the defendant has obtained the usual order for security for the costs of the action. The plaintiff, or those acting in his behalf, have offered

(*d*) p. 57. (*e*) 5 B. & S. 581; 33 L.J. Q.B. 275. (*f*) 5 H.L. 381. (*g*) L.R. 2 Ex 384; on appeal, L.R. 4 E. & I. App. 625. (*h*) p. 1414.

as security the bond of the Commercial Banking Company of Sydney, a company incorporated by Act of Parliament. The Prothonotary refused to approve of the security on the ground that such a bond was invalid, and a rule was obtained to shew cause why the Court should not review the decision. I am of opinion that that rule ought not to be made absolute, as I think that there is a want of power on the part of the corporation to give this security. This is the case of an ordinary banking company with the usual powers, which are set forth in the Act of Incorporation and the Deed of Settlement. In the section of the Act which defines the object of the company and the nature of the business to be carried on by it, certain things are expressly prohibited, such as the purchase of ships, the taking of shares in other companies, and other matters. It has been contended by Mr. *Darley* that, inasmuch as the giving of such a bond is not among the things prohibited by the Act of Incorporation, it may be done. We have been referred by him to a number of authorities, but I think the citations have no bearing on the present case. Even if the bond is not expressly prohibited, still, if it is beyond the scope of the object for which the company was constituted, it is not within the powers of the directors to give it. The general principle of law applicable to such cases as the present is set forth in *The Bank of Australasia* v. *Breillat* (*i*). There it was said that the power of directors of a company to bind the company is the same as that of the managing partners of a firm, and passages from *Story on Agency* (*j*) were approved and adopted in the judgment. Having been adopted by the Privy Council, they are binding upon this Court. [His Honor read the passages from *Story*.] Here the bond would be given for a purpose altogether outside the scope of the undertaking. A. sues B. A. resides in London, and B. obtains an order for security for costs. The bank offers its bond. What in the world has such a transaction to do with "the ordinary and legitimate purposes and operations of banking establishments?" If such a bond were held valid, I cannot imagine anything to which the directors might not bind the bank. They might execute bonds of recognizance, bonds of bail in criminal cases, bonds for the fidelity of agents or clerks, or for any conceivable purpose. Having regard to the powers of the directors who have charge of the seal of the company, as prescribed by the Act, I am of opinion that if a bond were given, though it is absolutely certain that it would not be repudiated, still it would be open to the shareholders of the company to repudiate it; and I think that the defendant is entitled to a security the validity of which is not dependent upon the prudence or integrity of anyone.

(*i*) 6 Moo. P.C. 152; 12 Jur. 192. (*j*) Chap. VI. §§ 124, 125.

At the same time I cannot say I approve of the course taken by the defendant here. Every one must know that the bank would not repudiate their bond, and that the security is practically good. I regret, therefore, that we must discharge this rule with costs.

HARGRAVE, J. We sit here as Judges to administer the law, and have nothing to do with probabilities as to whether this bond would be paid or not. The simple question before us is whether it is a good and valid bond, and I am clearly of opinion that it is not. We all know what ordinary banking business is—receiving money, lending money, taking securities, issuing notes, discounting bills; but no one ever heard that giving such a bond as this was any part of the business of a bank. A corporation has no inherent power to make any bonds at all any more than it can make a will. It is entirely the creature of statutes, and can only do such acts as the statutes authorise.

Sir W. MANNING, J. I concur in discharging the rule, but with considerable doubt as to whether the bond proposed to be given does not come within the scope of ordinary banking business. I should have thought it was part of a banker's business to transact matters for a customer during his absence, especially where, as in this case, power is given to a bank to open branches in other countries. At the same time there is no doubt that the defendant is entitled to a security that is unassailable; and I cannot say that the validity of the proposed bond is not open to question when the other members of the Court have decided that it is invalid. I think there ought to be no costs. There is no earthly objection to the bond except a mere technical objection, which ought by all means to be discouraged. But I am obliged to yield to the opinion of the majority of the Court.

Rule discharged with costs.

Attorney for the plaintiff—*A. De Lissa.*
Attorneys for the defendant—*Gannon & McLaughlin.*

SHEPPARD *v.* DUNN. (*a*)

Defamation—District Court—Jury.

In an action for libel in a District Court the Judge told the jury that if they believed that the defendant used the language complained of or language to the same purport and effect, the plaintiff should have a verdict.

Held, that such direction was wrong.

The District Court Judge ruled that the word "robbed" imputed an indictable offence.

Held (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; *dissentiente*, Sir W. MANNING, J.), that it ought to have been left to the jury to say whether the word, in the sense in which it was actually used, imputed an indictable offence.

The District Court Judge directed a jury to be summoned for the trial of the action pending in the Court by selecting each tenth person on the jury list until the requisite number was obtained.

Held (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; *dissentiente*, HARGRAVE, J.), that this manner of summoning jurors was not illegal.

APPEAL from the Southern District Court holden at Mudgee. The following was the case stated by the District Court Judge, the parties not agreeing.

"1. This was an action brought in the Mudgee District Court, and was heard at the July sittings of the same before the Judge of that Court and a jury of four persons. The plaint contained the following count:—"For that the defendant falsely and maliciously spoke and published of the plaintiff the following words: 'You low-lived —— rogue! you robbed Ben Bullock and Perram; but you and your —— confederate are not going to rob me. You —— Cockatoo-bred ——! it is a pity you ever got away from there. You —— scoundrel! I'll make an example of you and have you through the Insolvent Court in six months.' To that count the defendant pleaded not guilty, and a general verdict was returned for the plaintiff with £75 damages.

2. At the trial the plaintiff was examined on his own behalf and swore to the defendant having spoken all the words—the very words—laid in the plaint. The only other witness for the plaintiff was a Chinaman, who merely proved the speaking of three of these words, viz., "—— rogue," and "Cockatoo," though he added that there was a good deal of what he called "jabber" between the plaintiff and defendant, which he did not understand. The defendant swore that he had not made use of the words in the plaint or any of them.

3. His Honor told the jury that if they believed that the defendant used the language complained of, or language to the same purport and effect, the plaintiff should have a verdict; but that if the plaintiff had not satisfied them of that, then that the defendant should have the verdict. His Honor also told the

(*a*) December 13.

jury that if they found for the plaintiff they ought to award such damages as would compensate him for what they should consider the outrage to his feelings and injury to his reputation from the language of the defendant; that compensation to plaintiff, and not punishment to defendant was the measure of damages in such a case; though the damages to be awarded might have the *effect* of inducing the defendant to refrain in future from similar abuse of the plaintiff.

4. No objection whatever was taken to the concluding portion of this charge, but, after the jury had retired to consider their verdict, counsel for the defendant requested the Judge to call the jury back again into Court, and to tell them that the words laid in the plaint or some of them must be proved. The Judge declined to recall the jury for that purpose, because (as he stated) he had already told that to the jury, and he considered that they could not be misled by his having added the expression "or words to the same purport and effect" in a case like the present, in which the plaintiff swore to the use of all the very words laid in the plaint and the defendant swore that he had not used any of them.

The question for the determination of the Supreme Court upon the preceding portion of this case on appeal is:—Was the Judge wrong in point of law in having charged the jury as is hereinbefore stated?

During the address to the jury of defendant's counsel he treated the case as one falling within the provisions of 11 Vic., No. 13, s. 2, and therefore one in which the jury might find a verdict for the defendant if they considered that the words complained of in the plaint (even if spoken) were spoken on an occasion when the plaintiff's character was not likely to be injured thereby. But the Judge told the jury, either then or during his charge, that the statutory provisions did not apply to this case, inasmuch as he was of opinion that the words complained of imputed an indictable offence. As to this the question for the decision of the Supreme Court is:—Was the Judge wrong, in point of law, in the opinion thus expressed?

Lastly, judging from the draft of this case as submitted for settlement by the defendant's advisers, they appear to consider that the circumstances about to be stated afford ground of appeal to the Supreme Court, and justify such appeal. They are therefore stated for the determination of the Judges of that Court.

5. The four jurors by whom this case was tried, were summoned according to the express provisions of the 49th and 54th section of the District Courts Act from the jurors' book applicable to the Mudgee District Court. Upon the application of the

Registrar for instruction, the Judge caused twelve of the persons named in that book to be summoned for the purpose of trying this and the other actions then pending in that Court in which juries had been applied for; and, in order as much as possible to secure impartial juries, and to obviate abuses that had arisen at the prior sittings of that Court from the summoning of jurors in alphabetical order, the Judge directed the Registrar to summon, as such twelve jurors for the then approaching Court, each tenth person named in that book until the requisite number had been obtained. As to this matter the questions for the decision of the Supreme Court are:—1. Was the Judge's direction or causing the jury to be so summoned a determination or direction in point of law which is properly the subject of an appeal to the Supreme Court under the 94th section of the District Courts Act? 2. If so, was the Judge wrong in point of law in so directing or causing?

A. McFARLAND."

Butler, Q.C., and *Simpson*, in support of the appeal. As to the 1st point the Judge's direction was clearly wrong. The rule is that the very words laid in the declaration or some of them must be proved: *Barnes* v. *Holloway* (*b*); *Gutsole* v. *Mathers* (*c*); *Rainy* v. *Bravo* (*d*). Then the question whether the words used imputed an indictable offence was for the jury and not for the Judge: *Shepherd* v. *Whitaker* (*e*); *Hart* v. *Wall* (*f*). In *Sibley* v. *Tomlins* (*g*) it was left to the jury to say whether the words "thief" and "stole" imputed an indictable offence. As to the summoning of the jury, this Court has already decided in *Ex parte Dunn* (*h*) that the decision of the Judge that the jury was properly summoned was a determination in point of law, and is the subject of an appeal. As the District Courts Act of 1858 does not prescribe the mode of summoning the jurors it must be taken to have incorporated the provisions of the Jury Act (11 Vic., No. 20). It could never have been intended to leave to a District Court Judge the discretion of summoning a jury exactly as he pleased.

Darley and *Pilcher*, for the plaintiff, in opposition to the appeal. *Tomlinson* v. *Brittlebank* (*i*) decides that the word "rob" does impute an indictable offence. If it was used in any other sense, it lies upon the defendant to shew it. That case also shews that it is a question for the Judge whether words impute an indictable offence. No case decides that it is a question for the jury. [Sir JAMES MARTIN, C.J., refers to *Sibley* v. *Tomlins*.] There it was left

(*b*) 8 T. R. 150. (*c*) 1 M. & W. 495. (*d*) L. R. 4 P. C. 287. (*e*) L. R. 10 C P. 502. (*f*) L. R. 2 C. P. Div. 146. (*g*) 4 Tyr. 90. (*h*) *ante* p. 293. (*i*) 4 B. & Ad. 630.

to the jury, but there is no decision on the point. In the cases cited on the other side the question was not whether the words imputed an indictable offence, but whether they were slanderous; and of course that was for the jury. Then as to the summoning of the jury. The 14th section of the Jury Act points out the way in which the sheriff is to summon the jury, but section 54 of the District Courts Act gives no such directions. Under these circumstances it is clear that the Legislature intended to leave a discretion to the District Court Judge which was not left to the sheriff. Besides, even if the Jury Act does apply to cases in the District Court, the proviso to section 16 of that Act declares "that no omission or informality with respect to any lists or precepts or panels returned in pursuance of this Act shall affect or invalidate any verdict returned by a jury, which shall in other respects be according to law," and the Act 15 Vic., No. 3, s. 5, requires any objection to the summoning of jurors to be taken by way of challenge. That the Jury Act was not intended to apply is clear from the fact that juries in the District Court are chosen by ballot and not struck as in the Supreme Court. Again, it is only "for the purposes of the establishment of jurors' districts and the preparation of jurors' lists" that a District Court is to be deemed a Court for the trial of issues and the assessment of damages within the Act 11 Vic., No. 20. The jurors' book, too, must be made out in accordance with that Act, but the manner of summoning is left entirely to the Judge's discretion. Besides, this is not a question of law upon which an appeal will lie. *Ex parte Dunn* was decided without hearing argument. In that case it was only necessary to hold for the purpose of the decision that a prohibition would not go. Then an additional fact appears in that case which is not stated here. There it was stated on affidavit that exception was taken at the trial to the manner of summoning the jury, and the Judge overruled the objection. That was, no doubt, a direction on a question of law. But there is no such statement in the present case on appeal. As to the first point, the Judge's direction was immaterial, and could not have misled the jury.

Butler, in reply, was stopped upon the first point. In the construction of a statute we must look at the pre-existing state of the law. Therefore, the section of the District Courts Act relating to juries must be read with reference to the Jury Act in force at the time. Trial by jury was being established in the District Court for the first time, and must be subject, wherever the District Courts Act is silent, to the same incidents as trial by jury in the Supreme Court. Section 52 provides that the lists should continue in force for a year. The only object of such a provision

could be to secure that jurors should take their turn in serving. According to the argument on the other side, the Judge may summon the same jurors for every Court. As to the other point, it is clear here that the word "robbery" was not intended to mean an indictable offence. Can it be supposed that robbery with violence could be meant?

Sir JAMES MARTIN, C.J. This was an action for defamation in the District Court at Mudgee, and was tried before Judge *McFarland*. The words charged were (among others): "You robbed Ben Bullock and Perram, but you are not going to rob me." The plaintiff swore that all the words set out in his plaint were used, and the defendant denied that he used any of them. A Chinaman was called, who spoke to one or two of the words, but did not mention the word "rob." The Judge told the jury that if the defendant used the words complained of, or language to the same purport and effect, the plaintiff should have a verdict. A verdict was returned for the plaintiff with £75 damages.

Now I am clearly of opinion that the Judge was wrong in his direction to the jury. It is plain on authority that it will not be sufficient to prove words equivalent to those set out in the declaration. The plaintiff must prove the words charged, or a sufficient number of them. No doubt these questions of variance are not very important at the present day, in view of the large powers of amendment given to the Judges. If the words set out in the declaration are not proved, but evidence is given of equivalent words, the Judge may, and probably would, amend the declaration. But here there was no question of any such amendment. No doubt if the case had gone to the jury upon the evidence of the plaintiff, corroborated only as to three words by the Chinaman, without any direction at all by the Judge, and if they had found for the plaintiff, their verdict could not have been disturbed. But here there was clearly a wrong direction on the part of the Judge. It is said that this wrong direction could have done no harm. But a number of words is sworn to by the plaintiff. It may very well have been thought by the jurors, that it would be very hard for him to remember them all with accuracy, and they may not have believed the plaintiff as to all. They may have accepted the Chinaman's story, and looking to the Judge's ruling, and thinking the words sworn to by the Chinaman were equivalent, may have given their verdict under that impression. It is impossible to see that the ruling did not do harm, and, inasmuch as I cannot see that it did not influence the minds of the jurors, I think that there ought to be a new trial on this ground alone.

But another point is taken. The defendant's counsel having contended to the jury that if the words were used on an occasion

when the plaintiff's character was not likely to be injured, the jury might find a verdict for the defendant, the Judge ruled that the words used imputed an indictable offence, and that the statutory provision on which the defendant relied was therefore inapplicable. Now I take the law to be this. Where language is used which admits of one, and only one, interpretation, and that language is used on an occasion on which the plaintiff's character is not likely to be injured, it is the duty of the Judge to tell the jury whether or not the words used impute an indictable offence. But there are cases where the language used may admit of two meanings, and then it is the duty of the Judge to tell the jury that the words, if used in one sense, impute an indictable offence, if used in the other, do not; leaving it to the jury to decide in what sense the words were actually used. Now some words, such as "robber," are used to express deprivation of one person of his property by another in any way, and embrace every variety of fraudulent dealing. It was for the Judge to tell the jury the technical meaning of the word "rob," and to direct them that if used with that meaning it imputed an indictable offence, but if not, then it did not; and then it was for the jury to say ultimately whether, as a matter of fact, it did impute an indictable offence. That was done in the case in *Tyrwhitt*, and in the latest case cited it was said that that is what ought to be done. I think, therefore, that the Judge ought to have put it to the jury in that way, and that on that ground also the appeal should be sustained.

The third point is one of considerable difficulty. On the whole I think it is impossible to say that the Judge was wrong. Once the list is settled, the Judge is given a general power of selecting the jurors. He is not tied down by the Act to the same mode as the sheriff, under the 11 Vic., No. 20, has to follow. Not being limited in the mode of selection he was at liberty, I think, to do as he has done. It does not seem to me the wisest way, and it would no doubt be better to select the names in some kind of regular rotation, so that all would serve in turn. Still the course pursued was not illegal, and so far as that ground is concerned the appeal must fail.

HARGRAVE, J. On the first ground taken I agree that there was a material and fatal misdirection. The principle laid down was novel and indefensible in every way. Certain words were set out in the declaration and were proved in evidence. The jury were told to find a verdict for the plaintiff if the defendant spoke words to the same purport and effect. Such a direction cannot stand for a moment.

I also concur with the *Chief Justice* that a Judge trying an action of this kind ought to express his opinion upon the meaning

of the words used, but leave it to the jury to say whether the words were libellous or imputed an indictable offence. In that also the District Court Judge was wrong.

With regard to the summoning of a jury selected in this novel way—it is a mockery of the whole administration of justice. The statute takes care that the list should be prepared quite independently of the Judge; he has this list before him, and yet he is to be allowed to pick out the names just as he pleases. To use the words of Lord *Denman* in *O'Connell* v. *The Queen* (*j*), "trial by jury, instead of being a security to persons who are accused, will be a mockery, a delusion, and a snare." That case altogether disposes of the present, and shews that an irregularity in the manner of summoning a jury invalidates all the subsequent proceedings. It is not, as his Honor the *Chief Justice* has put it, a question of expediency, it is a question of common law; and the use of the word "jurors" binds the Judge to summon the jury in the way prescribed by law. I can conceive nothing more erroneous, more dangerous, or utterly unjustifiable, than this Judge's conduct.

Sir W. MANNING, J. If I could suppose it to be the case that the jury must have believed that the words sworn to by the plaintiff were spoken, I should think the Judge's direction immaterial. But the very fact of the Judge's direction being what it was, shews that there was evidence of words which might or might not be equivalent. And his direction seems to me to have been too broad. I am not prepared to say that in all cases exactly the same words must be proved as are charged in the declaration. For instance, there are many words in the English language which are synonymous, the only difference between them being that some are Saxon, others Roman, derivatives. Suppose a word proved in evidence the exact synonym of the word charged to have been spoken, would not that be sufficient? But here I think the Judge laid down the law in such a way as was likely, in this particular case, to mislead the jury.

I quite agree that words which are upon the face of them susceptible of two meanings ought not to be interpreted by the Judge, but should be left to the jury, in very much the same way as questions of reasonable and probable cause in actions of malicious prosecution are left to them. In other words it is for the Judge to tell them the effect of the meaning, but for them to find what the meaning was. In this case we have nothing in the context to shew in what sense the words "you robbed Ben Bullock" were used. I am inclined to think that the words standing alone without anything to qualify or explain them did impute an indictable offence, and I cannot say that the Judge was wrong in his ruling on this point.

(*j*) 9 Jur. 25.

On the third point also I cannot say that the Judge was wrong. The provisions of the Jury Act are followed up to the time of making up the jury books. All through the clauses of the District Courts Act which relate to juries, there is not a word about the Registrar. He is not put in the place of the sheriff; and there is nothing in the Act to prevent the Judge from summoning by the bailiff. There can be no doubt that the course which has been taken was not contemplated by the framers of the Act, but I am afraid it is too plain that the Legislature has omitted to specify the mode to be adopted in selecting jurors. The Act has in fact left the District Court Judge in a similar position to that of the coroner.

But if we come to the question whether the course adopted in this case is expedient, I quite concur with his Honor the *Chief Justice*. If the Judge has before him the fact that the Legislature has approved of one particular system to secure the impartiality of jurors, and has directed that they shall be summoned alphabetically, it is much wiser for him to follow that system, even if the Act does leave him a discretion. If he adopts a new-fangled way of proceeding it is sure inevitably to lead to imputations of packing juries. Besides, if only every tenth man is selected, the same men would always have to serve, and the intermediate persons on the jurors' book would be excused. At the same time, the course the Judge took was, in my opinion, legal.

Appeal sustained with costs.

Attorney for plaintiff—*E. Clarke* (by *F. Curtiss*).

Attorney for defendant—*W. Oliver.*

McELHONE *v.* YOUNG. (*a*)

Promissory Note—Due notice of Dishonour—Interference with course of post.

The defendant lived 30 miles from a post-town D., where there was no delivery, but letters were kept till called for. Notice of dishonour of a promissory note indorsed by defendant was sent on the day it came from the bank to an innkeeper at D., with instructions to serve it at once. He did not call at the post-office for two or three days, when he received the notice, and served it the same day as received.

Held, that, under the circumstances, the notice was reasonable. What will amount to waiver of due notice of dishonour, *Quære?*

ACTION upon a promissory note for £420 made by one John McDonald in favour of Messrs. Curtis & Gannon, and indorsed to the defendant, and by her indorsed to the plaintiff. The

(*a*) December 5.

defendant pleaded that she did not receive due notice of dishonour, and that she did not indorse. The action was tried on the 9th of August, 1877, before Sir *W. Manning*, J., and a jury, and a verdict was found for the plaintiff for £436 16s.

Simpson, in the same month, obtained a rule *nisi* for a nonsuit, on the grounds that there was no evidence of due notice of dishonour, or of waiver by the defendant of due notice, and that the learned Judge misdirected the jury by telling them that if the defendant did not say anything about not having received notice of dishonour, but admitted her liability on the note, she might be taken to have waived her right to notice of dishonour in due time, and that the jury might then think the notice of dishonour sufficient.

The facts of the case were shortly as follows:—The defendant was the mother of one John McDonald, who was indebted to the plaintiff, and was threatened with a criminal prosecution for selling without authority cattle belonging to the plaintiff and not accounting for the proceeds. Ultimately the plaintiff agreed to accept McDonald's promissory note endorsed by his mother, the defendant. The note sued upon was accordingly sent. On its due date, the 11th of January, it was dishonoured, and Curtis & Gannon (plaintiff's solicitors) received notice of dishonour from the bank. On the same day they wrote to an innkeeper at Denman enclosing notice of dishonour, and asking him to serve such notice on the defendant. Denman was her post-town, but she lived 30 miles away. There was no delivery of letters at Denman, but persons had to call for their letters at the post-office. The notice was received by the innkeeper on the 17th January, and served on the same day by his son on the defendant. The letter must on the 17th have been lying for two or three days in the post-office. The defendant afterwards admitted her liability on the note.

Simpson, in support of the rule. To waive the right to due notice of dishonour it is necessary that there should be an express promise to pay: *Pickin* v. *Graham* (*b*). *Cordery* v. *Colville* (*c*) and *Woods* v. *Dean* (*d*) were both cases of express promise to pay. Here there was no evidence of any promise. Besides, an admission of liability is only evidence where no notice at all is proved—not when it is shewn that the notice was bad: *Pickin* v. *Graham*, *Darbishire* v. *Parkes* (*e*) is exactly in point. There the notice was delayed by being sent by a private hand, and the notice was held insufficient. If a person interferes with the course of post, and takes upon himself to forward the notice, he is responsible for the delay.

Pilcher, who appeared to shew cause, was not called upon.

(*b*) 1 C. & M. 725. (*c*) 32 L. J. C. P. 211. (*d*) 32 L. J. Q. B. 1. (*e*) 6 East 3.

HARGRAVE, J. In my opinion the rule ought to be discharged. In all mercantile matters there is no fixed rule of statute law at all. They are not like the case of the execution of a will. That of course must be strictly proved in accordance with the requirements of the statute. But all mercantile questions depend upon the circumstances of each particular case. Here it is proved that the defendant received legal notice within a certain number of days of its leaving Curtis & Gannon's office. I am clearly of opinion, taking all the circumstances of the case into consideration, and looking at the pleadings and evidence, that the jury gave a right verdict. There was no misdirection.

FAUCETT, J. These questions always come before the Court with reference to mercantile customs and mercantile usages. But some of these customs are so confirmed by decisions of the Courts as to amount to law. The Courts have held in certain cases that notice must be given in a certain way to be reasonable. But the question in this case is whether under the circumstances of this colony it is unreasonable to take an unusual way to send notice of dishonour to an out-of-the-way part of the country. No doubt there was a very strong expression of opinion on the part of his Honor who tried the case that there was not sufficient evidence of waiver. I think there was; but if the verdict can be supported either on the ground of due notice or on that of waiver it is sufficient. I think it can be supported on the ground that the notice was reasonable.

Sir W. MANNING, J. The question always is what notice is reasonable under the circumstances of each particular case; there is no absolute statutory rule. Here there were very special circumstances, and it is impossible to say that Curtis & Gannon acted unreasonably. The question is whether to send the letter to Mrs. Young at the post-office at Denman, where it may lie for weeks before she receives it, or to send it to a person likely to deliver it more promptly, is the more reasonable course. And if a person pursues the most reasonable course he is not responsible for the acts of the person he chooses. The only question being the reasonableness of the action of Curtis & Gannon, I think they did what was best under the circumstances, and that it is impossible to say that the jury were wrong. I also think that there was some evidence to go to the jury of waiver, and that though it was not very strong, we cannot disturb their verdict.

Rule discharged with costs.

Attorneys for the plaintiff—*Gannon & McLaughlin.*

Attorney for the defendant—*W. Briggs.*

SANDEMAN *v.* COHEN. (*a*)

Parties to Action—Official Assignee—Completion of Contract by surety.

Plaintiff after the judgment of the Court (reported *ante*, p. 371) filed an amended replication setting out a bond under which W. was surety for A. in the sum of £250, and one of its conditions which stipulated that in case of the insolvency of A. or any delay in or suspension of the work, "the employer, by the architect, might give to the contractors or their sureties or their assignee or trustee, as the case might be, notice requiring the works to be proceeded with," and in case of default the defendant might employ other persons to complete the work and set off the expense against the money payable to A. under the contract. The replication went on to state that the defendant gave notice to W. and that W. proceeded with and completed the works according to the specifications, &c., and that the right of action vested in the official assignee of A., and that he was suing partly for his own benefit and partly for the benefit of W.

Held (*per* HARGRAVE and FAUCETT, JJ.; Sir JAMES MARTIN, C.J., *dissentiente*), that the replication was good.

The declaration and pleas in this action are already reported (*b*). After the judgment holding the plaintiff's replication bad, he filed an amended replication in the following terms:—

That the bond in the said pleas mentioned was in the words and figures following, that is to say:—[The bond was set out verbatim, the condition being "that if the said Allen (the insolvent), his executors, or administrators, shall within the period of ten months from the date of the above-written bond do, perform, execute, and completely finish, or cause to be done, &c., all and singular the several erections, &c., mentioned, specified, and particularised in the hereinbefore in-part recited agreement, and the plans, drawings, specifications, and conditions in the said agreement referred to, and every one of them, confirmably to the said agreement, plans, drawings, specifications, and conditions in all respects whatsoever, and in a good and workmanlike manner to the satisfaction of the said Abraham Cohen (the defendant) or of such person or persons as he may from time to time appoint to supervise the works, then the above-written bond, &c."] And the plaintiff says that one of the said conditions in the said bond referred to was in the words and figures following, that is to say:—"If the contractors shall become bankrupt, or compound with, or make any assignment for the benefit of, their creditors, or shall suspend or delay the performance of their part of the contract (except on account of causes mentioned in clause 15 or on account of being restrained or hindered under any proceedings taken by parties interested in any neighbouring property, or in consequence of not having proper instructions for which the contractors shall have duly applied), the employer, by the architects, may give to the contractors, or

(*a*) December 14. (*b*) *Ante*, p. 371.

their sureties, or assignee, or trustee, as the case may be, notice requiring the works to be proceeded with; and in case of default on the part of the contractors or their sureties, or assignee, or trustee for a period of thirty days, it shall be lawful for the employer by the architects to enter upon and take possession of the works, and to employ any other person or persons to carry on and complete the same, and to authorise him or them to use the plant, materials, and property of the contractors upon the works; and the costs and charges incurred in any way in carrying on the works are to be paid to the employer by the contractors, or may be set off by the employer against any money due or to become due to the contractors." And the plaintiff says that after the making of the said bond, and in pursuance of the said condition in that behalf the defendant gave the said W. J. Watson, as such surety as aforesaid, notice requiring him to proceed with the said works, and the said Watson thereupon proceeded with and duly completed the said works in accordance with the said contract, specifications, and conditions, and under the provisions of the said bond in the said pleas respectively mentioned, and not otherwise. And the plaintiff further says that upon such due completion as aforesaid the right of action under the said deed vested in the plaintiff as official assignee of the insolvent estate and effects of the said Allen, and that he is suing in this action in order to recover from the defendant, partly for his own benefit as such official assignee as aforesaid, and partly for the benefit of the said Watson, the balance of the moneys due from the defendant under the said deed upon the due completion of the said works.

DEMURRER on the grounds: That on the sequestration no right of action passed to the plaintiff in respect of the amount now sued for, and that neither the plaintiff nor Watson was in any way bound to complete the said works; and the replication shews that the plaintiff in fact did not do so: That the said works having been completed by Watson in the manner alleged in the pleas and admitted in the replication, no right of action thereby became vested in the plaintiff, entitling him to sue for work done by Watson for his own benefit, and not for that of the creditors.

M. H. Stephen (*C. B. Stephen* with him) supports the demurrer. We admit that the assignee has a right to carry on a contract for the benefit of the insolvent's estate, and that if he had carried on this contract he would have a right to sue. There is another case in which the assignee can sue. That is when the insolvent is in trade and acquires property. If insolvency supervenes the assignee can come in and claim the property for the creditors in the estate. But here, before any insolvency at all Allen abandoned the work. On the former argument they relied on *Purcell*

v. *Raphael* (*c*). But there the contract was completed before the insolvency. Now what do they put into their replication to bring the case within *Purcell* v. *Raphael*? The part of the agreement inserted is not a condition which could be referred to by the bond, for the condition of the bond is that Allen, and not anyone else, should complete the work. The stipulation of which they seek to take advantage is inconsistent with the bond. But, even if it is to be considered as incorporated in the bond, it shews conclusively that in no way was Watson bound to complete the work. It carries the case no further. The last part of the replication, alleging that "thereby" a right of action vested in the plaintiff, is a mere conclusion of law, which we deny. There is only one way in which the plaintiff can sue, and that is as trustee for Watson; and the Court has already decided that he has no *locus standi* in that character (*d*). *Griffith and Holmes' Bankruptcy* (*e*); *Beckham* v. *Drake* (*f*); *Tooth* v. *Hallett* (*g*); and *Knight* v. *Burgess* (*h*) were referred to and commented upon.

Darley (*Butler*, Q.C., and *Manning* with him), in support of the replication. The general propositions of law are correctly stated by the other side, but they have no application here. In the deed of agreement between Cohen and Allen there was a covenant to pay, and no one could sue on that covenant but Allen, or his assignee. It cannot be disputed that 25 per cent. on the value of the work done before the sequestration is due to Allen or his representative, and that can certainly be recovered in this action, whoever finished the work. Of course if the work had been altogether abandoned the 25 per cent. would not be payable; but the work has been completed, and the assignee is entitled to recover. And if any part of the money is recoverable by the assignee he can sue for the whole. The rule is stated as follows in *Dicey on Parties to Actions* (*i*): "If the bankrupt has any beneficial interest, however small, if, that is to say, any portion whatever of the money recovered would, but for the bankruptcy, have gone to the bankrupt himself, then the right of action for a breach of the contract passes to the trustee, who, however, recovers partly for his own benefit as such trustee, and partly for the benefit of the *cestui que trust* or the other person beneficially interested." For that position the case of *D'Arnay* v. *Chesneau* (*j*) is cited. In *Carvalho* v. *Burn* (*k*), *Littledale*, J., in delivering the judgment of the Court, says: "If at the time of bankruptcy the bankrupt possessed a possibility of interest, from which a benefit to his creditors might result, if he had the legal interest in any

(*c*) 7 S.C.R. 138. (*d*) *ante*, p. 373. (*e*) pp. 304, 310. (*f*) 13 Jur. 921. (*g*) L.R. 4 Ch. 243. (*h*) 33 L.J. Ch. 727. (*i*) p. 192. (*j*) 13 M. & W. 796. (*k*) 4 B. & Ad. 493.

property" (as here he was the covenantee under the deed, and the only person with a legal interest) "and it was uncertain whether he would hold any part of that property, or, if any, what part, as a trustee for others, the whole would pass by the assignment; it could not remain in the bankrupt, subject to be transferred on a future contingency; and, if it did pass to the assignees, it could not be divested out of them in whole or in part by the happening of events subsequent to the act of bankruptcy which might make them hold the whole or some specific part as trustees merely; for there is no provision in the statute which takes a right out of the assignees that has once been vested in them." This decision is expressly in point to shew that an official assignee can sue partly for himself and partly for another. The 25 per cent. on the work done by Allen, and the whole amount for the work done by Watson, cannot be separated. They are both due upon the completion of the work, and both due under the deed. Cohen might have treated the contract as broken when Allen abandoned it, but he chose to keep it open by requiring Watson to carry it on. In *Frost* v. *Knight* (*l*) it is said, in the judgment of *Cockburn*, C.J., that "the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Stephen, in reply. I admit that the assignee is the only person who has a right to sue upon the deed, but, under the circumstances that have occurred, no one has a right to sue upon it. The question is whether the assignee must not adopt a contract before suing upon it. Here there is nothing to shew that he has adopted the contract. Besides, another objection is that the replication is pleaded to both pleas; therefore, as to the 25 per cent., the assignee is suing partly for the benefit of the estate, partly for the benefit of Watson, though Watson had nothing to do with the work for which it was payable. There is nothing in the bond to compel Watson to complete the work. Then it is said that Watson virtually stood in Allen's shoes. Suppose Watson had been doing the work badly, or had been guilty of delay, could Cohen have brought an action against Allen's assignee? Certainly not; and that shews that Watson was doing the work on his own account, and not as representing Allen.

(*l*) L. R. 7 Ex. 114.

Sir JAMES MARTIN, C.J. [After stating the pleadings.] This Court has already held that the work which Watson performed was not done by him under the contract between Cohen and Allen, and, therefore, that the plaintiff could not succeed. The plaintiff has now added to his replication allegations shewing that, under the agreement, Cohen might call upon Watson to complete the work, and that Watson might complete it. In my opinion that carries the case no further, and the demurrer should be allowed.

HARGRAVE, J. When the case was last before the Court I lost sight of the right of the official assignee to recover the 25 per cent. on the work done by Allen. There can be no doubt about that right. As soon as the 75 per cent. was paid, the 25 per cent. became due—*solvendum in futuro*, but *debitum in præsenti*. Now that the work has been completed, the plaintiff is at liberty to sue for that amount. I still remain of opinion that the plaintiff cannot recover in respect of the work done by Watson. But that does not make his whole claim bad. I think, therefore, that the demurrer should be overruled, and the plaintiff allowed to go on and recover what he legally can.

FAUCETT, J. I am of the same opinion as on the last occasion, and my opinion has been confirmed by further argument. As to the allegation that the plaintiff is suing partly as a trustee for Watson, I think it is an error to insert any such clause. The cases cited do not apply—there the assignee had the complete legal right. But here the plaintiff states that he sues simply as official assignee. How, then, can he sue as trustee for Watson? And I am clearly of opinion that, if the plaintiff succeeds in this action, Watson must still go into the Insolvent Court and prove. But I think the plaintiff is entitled to recover the whole amount. The demurrer admits that the work was done under the deed, and, though nominally done by Watson, was really in law done by Allen. Cohen, in fact, never accepted Allen's abandonment, and Allen, if he had not become insolvent, and not Watson, would have been the proper person to sue. Now the official assignee, having taken up the contract, may come in. Cohen, not having adopted the abandonment, is estopped from saying that the contract was abandoned. I cannot, however, understand how the assignee has any right to sue as a trustee for Watson, and I think Mr. *Darley* only weakened his case by introducing that averment.

Judgment for the plaintiff.

Attorneys for the plaintiff—*Slade & Smith.*

Attorneys for the defendant—*Scarvell & Gordon*, by *Capes & Westgarth.*

EX PARTE POLLARD (*a*).

Construction of Will—Blanks—Charge of Debts—Sale by Registrar of District Court.

The Court will, if necessary, transpose or supply words in a will in order to carry out the apparent intention of the testator.

A will contained the following clauses:—"I nominate and appoint my said wife H. sole executrix of this my will, and hereby direct that all my just debts, funeral and testamentary expenses, be fully paid and satisfied as soon as conveniently may be after my decease." The testator's real property was devised by the same will to T. R. T. R.'s interest in the land was sold under a *fi. fa.*, and conveyed by the Registrar of the District Court. *Held*, that the Registrar could make a good title without the concurrence of the executrix.

It is no objection to the validity of a deed of bargain and sale executed by a District Court Registrar under s. 79 of the District Courts Act of 1858, that the writ of *fi. fa.* was not registered previously to the sale.

SUMMONS under the 26 Vic., No. 9, s. 107, calling upon the Registrar-General to substantiate and uphold the grounds of his refusal to bring under the Real Property Act certain land, the subject of an application by J. H. Pollard. Pollard claimed the land by virtue of a purchase at a sale by the Registrar of a District Court of the right, title, and interest of one Thomas Richards, who claimed as devisee under the will of one John Ward, the original Crown grantee. The grounds stated by the Examiners of Titles in support of their objections to the title were as follows:—

1. The Examiners know of no authority, nor has any been cited by the applicant which would justify them in placing such a construction on the will in question, either by means of filling up blanks, or supplying or transposing words, as would be necessary in order to make it effectual to pass an estate in fee to Thomas Richards, the supposed devisee. The blanks in the original will might be filled up in many ways inconsistent with the assumption that the testator's intention was to confer such an estate on Thomas Richards; and if transposition be called in aid, it is evident that the words "Thomas Richards" ought to be taken from this present position in the sentence and placed after the word "unto," and the word "her" inserted after the word "for," thus making Richards a bare trustee for testator's wife. And, even assuming that the examiners would be justified in acting upon extrinsic evidence, there is nothing before them beyond the will indicating the testator's intention, or explaining the circumstances connected with the insertion of the devisee's name, and the making and execution of the will in question. The following cases and text-writers have been referred to on these points: *Taylor* v.

(*a*) December 13.

Richardson (*b*); *Greig* v. *Martin* (*c*); *Edmonds* v. *Waugh* (*d*); *Mason* v. *Bateson* (*e*); *Charter* v. *Charter* (*f*); *Wigram on Extrinsic Evidence* (*g*); *Jarman on Wills* (*h*); and although none of these authorities is exactly in point, yet their tendency appears to the Examiners to be rather in favour of the rejection of the devise, as void for uncertainty in its object than of its sufficiency, at least as that devise now stands unaided by extrinsic evidence (assuming such evidence to be admissible), or by the sanction of judicial construction.

2. But even if the Court should consider the devise not to be void for uncertainty, and be of opinion that an absolute estate in fee passed to Thomas Richards, yet it is apprehended that the title, as presented to the Examiners, is still open to very grave objection, inasmuch as the will under consideration contains a general charge of debts, and the executrix is not a party to the conveyance by the District Court Registrar, nor is her implied power to sell the real estate under the charge otherwise got rid of. This point seems to be set at rest where real estate is subject to a charge of debts, and the estate charged is not devised by the testator to a trustee for his whole estate and interest, by section 16 of the Trust Property Act of 1862. But, apart from the statute, the following authorities may be cited: *Shaw* v. *Borrer* (*i*); *Ball* v. *Harris* (*j*); *Forbes* v. *Peacock* (*k*); *Robinson* v. *Lowater* (*l*); *Wrigley* v. *Sykes* (*m*); *Sabine* v. *Heape* (*n*); *Greetham* v. *Cotton* (*o*); *Gosling* v. *Carter* (*p*); *Colyer* v. *Finch* (*q*); *Cook* v. *Dawson* (*r*); *Corser* v. *Cartwright* (*s*); *Jarman on Wills* (*t*). In one of the above cases—*Wrigley* v. *Sykes*—although thirty years had elapsed after the testator's death, the Court held that the executors could sell the estate, as they alleged, to pay the debts; and in *Sabine* v. *Heape* the *Master of the Rolls* said that the vendors—that is, the executors selling under their implied power the testator's real estate twenty-seven years after his death—were not even bound to state whether there existed any debts which made the sale necessary. In this state of the authorities the Examiners have not hesitated to recommend the rejection of a title derived through the alleged devisee alone. It would appear, moreover, if the opinions expressed by an eminent writer, Mr. Joshua Williams (*u*), be correct, that the Statute of Limitations would not bar creditors under a charge such as that under consideration; because the combined effect

(*b*) 2 Drew. 16. (*c*) 5 Jur. M. S. 329. (*d*) 4 Drew. 275. (*e*) 26 Beav. 404. (*f*) L. R. 7 H. L. 364. (*g*) p. (*h*) Vol. I. p. 470. (*i*) 1 Keen 559. (*j*) 4 My. & Cr. 267. (*k*) 1 Ph. 717. (*l*) 5 D. G. M. & G. 275. (*m*) 21 Beav. 337. (*n*) 27 Beav. 553. (*o*) 34 Beav. 615. (*p*) 1 Coll. 650. (*q*) 5 H. L. 922. (*r*) 29 Beav. 123. (*s*) L. R. & Ch. 971. (*t*) Vol. II. p. 552. (*u*) Real Assets, pp. 91, 92.

of the charge in the will, and of the 14th and 16th sections of the Trust Property Act of 1862 is to create a trust. But, be that as it may, it is clear, according to the authorities cited, that no evidence of payment of the testator's debts is admissible in order to get rid of the implied power in the executrix to sell; for a debt only inchoate at his death might ripen into an actual debt twenty years afterwards, and, as to such an obligation, even the executrix might not be able to give satisfactory evidence.

3. A third objection to this title arises out of the sale and transfer by the District Court Registrar. The writ of *fi. fa.* under which the sale was effected is dated the 29th March, 1867, and was registered on the 18th June, 1866, nearly two months after the execution of the conveyance from the Registrar, which is dated the 30th April, 1866, and was registered on the 20th June, 1866. Now, although by the 79th section of the District Courts Act of 1858 a deed of bargain and sale, if registered in manner therein provided, is made effectual as a conveyance, yet it would seem from the 81st section of that Act to be necessary, in order to give a title, that the writ should have been registered *previously to sale* by the Registrar and execution of the transfer to the purchaser.

Examiners of Titles—*J. B. Jones, A. Oliver.*

March 29th, 1877.

The will of John Ward is printed at page 507 with the lines and blanks in the same position as in the original manuscript.

Owen, for the Registrar-General, was stopped by the Court.

Davis (*Darley* with him), in support of the summons. We find in this devise the subject matter clearly indicated. It is evident that the testator had not made up his mind as to the object of his bounty, so he leaves a line for the name of the devisee. Afterwards, by mistake, he inserts the name "Thomas Richards" in the space lower down, between two paragraphs of the will, instead of in the line he had left for the name. The clause in question may be made to read grammatically in two ways, either by inserting "of" after "absolute use and benefit," or transposing the words "Thomas Richards." It is quite clear that that can be done. In *Doe and Wolfe* v. *Allcock* (*b*), Lord *Ellenborough* says: "The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; but although the language of this will is confused, and the words are scattered in such a way as if taken in the order in which they stand they do not convey any meaning; yet, in favour of common sense, we may take the liberty of transposing them

(*b*) 1 B. & Ald. 140.

according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention," In *Abbott* v. *Middleton* (*c*), all the authorities were considered by Lord *St. Leonards* in his judgment. [Sir JAMES MARTIN, C.J.: In both those cases there was a clearly expressed intention to leave something to the persons mentioned. It was clear that they were objects of the testator's bounty.] What is the name of Richards in this will for, if the testator did not intend to leave him something?

[Sir W. MANNING, J. The testator probably put in "Thomas Richards" last. What did he do it for? It must either have been as a conduit pipe or a beneficiary; it must have been put there for some definite purpose. Sir J. MARTIN, C.J. Is there any case exactly in point?]

Owen refers to *Taylor* v. *Richardson* (*d*).

Davis. In *Taylor* v. *Richardson*, no subject matter upon which the devise might operate is mentioned. *Doe* v. *Micklem* (*e*) is much more like the present case. There the Court supplied the words "after the death." *Edmunds* v. *Waugh* (*f*) was also referred to.

Owen. If there are more ways than one in which the words can be supplied, the Court will not interfere, and the devise will be void for uncertainty. Or, if the devise can be read as to Richards as a trustee for the testator's widow, the Court will presume in favour of the widow as against a stranger. If the words "Thomas Richards" are transposed, "her" may be inserted just as well as "his" before "absolute use and benefit," and then there would be a devise to Richards as trustee for the widow. What is more natural than that the testator should leave his property to his widow? Here, until the testator had made up his mind whether to insert "his" or "her," there was only an inchoate intention, and the gift was void for uncertainty: *Mason* v. *Bateson* (*g*), *Gill* v. *Bagshaw* (*h*). In all cases in which the Court has transposed words in a will, there could be no possibility of mistake. For instance, in *Bradwin* v. *Harper* (*i*) it was clear that the testator had transposed by mistake the names of his nieces. So in *McKechnie* v. *Vaughan* (*j*). In *Doe* v. *Allcock*, Lord *Ellenborough* says that the meaning of the testator was evidently to dispose of the whole.

PER CURIAM. We will hear you on the other point.

Owen. *Robinson* v. *Lowater* (*k*), and *Wrigley* v. *Sykes* (*l*), are decisive on this point. It has been decided that a mere direction

(*c*) 7 H. L. 68, 102. (*d*) 2 Drew. 16. (*e*) 6 East. 486. (*f*) 4 Drew. 275. (*g*) 26 Beav. 404. (*h*) L.R. 2 Eq. 746. (*i*) Ambl. 374. (*j*) L.R. 15 Eq. 289. (*k*) 17 Beav. 592; 5 D. G., M. & G. 272. (*l*) 21 Beav. 237.

to pay debts operates as a charge on the real estate and gives the executors an implied power of sale, and that length of time will not raise any presumption that the debts have been satisfied, or destroy that power. Consequently, so long as the executors do not concur in a sale by the devisee, the title of the purchaser is not secure.

Davis. In this will the direction to pay debts is in connection with the clause appointing an executrix, thereby indicating the fund out of which the debts are to be paid, viz., the personalty. *Colyer* v. *Finch* (*m*) shews that the doctrine of the implied power of sale in the executors has no application to a case where the estate is devised beneficially to another, and that in that case the devisee is the person, and the only person, who can make a legal title. That case was followed in *Corser* v. *Cartwright* (*n*), where the same contention as is now put forward by the Examiners was overruled. *Bullen* v. *a'Beckett* (*o*) and *Turner* v. *Cox* (*p*) decide that in this colony the devisee is the person to pay the debts, and that the executors have no implied power of sale. At the very utmost all the Examiners can do is to note the possible charge of debts on the land as an incumbrance, but not to regard it as a defect in title. Again, there has been no caveat by the executrix in this case, and there is no evidence before the Court that the testator left any debts at all. In the absence of evidence the Court will not presume either for or against the existence of debts.

Owen (in reply upon the second point). *Bullen* v. *a'Beckett* and *Turner* v. *Cox* have nothing to do with the present case. Those cases only decided that the executor did not take the legal estate in real property beneficially devised, by virtue of the Statute 54 Geo. III., c. 15. They have no bearing on the question whether the executor has an implied *equitable* power of sale. It is not contended that the executor can convey the legal estate. *Colyer* v. *Finch* may be distinguished as applying only to a case where there is a devise of certain land specifically charged with the payment of debts. In that case the devisee, and not the executor, is clearly appointed by the testator a trustee for the payment of the debts, and he must have the power of sale.

Cur. adv. vult.

Sir JAMES MARTIN, C.J. (*q*). This matter came before us under section 197 of the Real Property Act. The Registrar-General has submitted to us three distinct grounds of objection to the title of the applicant. The first is that Thomas Richards, through whom the applicant claims, and who claims under the will of the original grantee, takes no estate under that will.

(*m*) 5 H. L. 922. (*n*) L. R. 8 Ch. 971. (*o*) 1 Moo. P. C. N. S. 223.
(*p*) 8 Moo. P. C. 288. (*q*) December 12.

The original will has been produced, and I have it now before me. I do not know whether it appears that the whole of the will is in the handwriting of the testator. It seems to me that it is; but that fact is not necessarily of importance. This document contains blanks, and it is drawn in two separate clauses, one dealing with the personal and the other with the real estate, and both using the same terms.

The first clause is as follows:—"I give, devise, and bequeath unto my dear wife Harriett all my goods, chattels, and personal estate whatsoever and wheresoever, for her own absolute use and benefit." Then comes the clause intended to dispose of the realty:—"I give, devise, and bequeath unto all and singular my real estate situate in and about Hay for absolute use and benefit Thomas Richards." Of course read in this way the sentence is not only ungrammatical, but insensible. But in dealing with such a document it is the duty of the Court to find out, if possible, what the intention of the testator was in using these words, to which, taken in their actual collocation, no meaning whatever can be attached. And we must find out the meaning of the words he has used, not by surmise, not by any process of mere speculation and guess-work; we are not to make a will for him, or to decide he meant something which it does not clearly appear from the will that he did mean; but we have to construe the words, if possible, and place such a construction upon them as it appears from the rest of the will they were meant to bear. Throughout the argument I have had extreme doubt how we ought to read this clause of the will, but I now think, on the whole, that we ought to read it as a devise of the testator's real property at Hay to Thomas Richards. I cannot understand any reason why his name should be put there with any other object. It has been suggested that the testator might have intended to make him a trustee for his wife. But I can see no reason why in leaving his realty to his wife he should interpose a trustee, any more than in bequeathing his personalty to her. I think we should not be at all warranted in coming to the conclusion that the name of Thomas Richards was put there as a trustee. Now, if the Court in interpreting a will can see what the intention was, it may transpose the words and even supply other words, provided the intention is clear on the face of the document. And here, though not without some doubt, I think the intention does appear on the face of this will. No case has been cited exactly in point, but it is impossible to find cases applicable to all the questions arising on the construction of wills. It has often been remarked by Judges that the language used by testators varies so infinitely; their ignorance is sometimes so great, and the language they employ is so extravagant,

This is the last will and Testament
of me John Ward of Hay in the Conley
of new South Wales Butcher

I give Devise and bequeath unto
my Dear wife Harrett all my
goods Chattels and personal Estate
whatsoever and wheresoever for her
own absolute use and benefit

I give devise and bequeath unto

all and Singular my real estate
Situate in and about Hay for
absolute use and benefit
Thomas Richards
I nominate and appoint my
Said wife Harrett Sole executrix
of this my will and hereby direct
that all my Just debts funeral
and testamentary expences be
fully paid and Satisfied
as Soon as Conveniently may
be after my decease

and I heareby declare
this to be my Last will
and testament dated this
nineteenth day of November
one thousand eight hundred
and Sixty two

John Ward

that it would be impossible to lay down any general rules applicable to all wills. The only rule is that the Court must find out, as best it can, the intention of the testator from the words he has actually used, and carry out his intention. I think the Court ought to pronounce against this objection, though there can be no question that the Examiners were quite right in raising the point.

Now we come to the next objection. It appears that judgment was obtained against Richards in the District Court at Hay, execution issued, and the land in question was sold by the Registrar under the execution. Exception is taken to the title on the ground that there may still be outstanding debts against the estate of Ward (the testator), and that unless the executrix joined in the conveyance by the Registrar, that conveyance would not be effectual to pass the land to a purchaser. That raises a very important question. In this will there is a direction to pay debts, and there are many cases both at law and in equity where it has been decided that a direction to pay debts will create a general charge of debts on the real estate of the testator. Then comes the question, which we have now to consider, whether under a general charge of debts the executor can sell lands specifically devised. The Courts have come into collision on this point. The Court of Exchequer decided in one case that the executor had no such power, and I am of opinion that in this Court we should follow that decision. It seems to me most in accordance with common sense and the general understanding of the profession. I refer to the case of *Doe d. Jones* v. *Hughes* (*r*), where it was held—I read from the marginal note—that "an executor has no implied power to sell or mortgage lands which descend to the heir charged *simpliciter* with the payment of debts." *Parke*, B., delivered the considered judgment of the Court, and at p. 231 of the report he says:—"On looking through all the cases, not a single authority is to be found which says that a simple charge of the estate with the payment of the debts does more than make a charge upon the estate in the hands of the devisee, if the estate is devised, or upon the estate in the hands of the heir-at-law, if the estate devolves upon him by the law of inheritance."

Two cases have been referred to in the argument in which the *Master of the Rolls* held otherwise. These were the cases of *Robinson* v. *Lowater* and *Wrigley* v. *Sykes*. They are referred to in *Sugden's Vendors and Purchasers* (*s*), but evidently with disapproval. The will before us contains these words:—"I direct that all my just debts, funeral and testamentary expenses, be fully

(*r*) 6 Ex. 223. (*s*) p. 545.

paid and satisfied." No portion of the testator's real estate is charged expressly or specifically with the payment of his debts, but the charge is only created by implication. No doubt the real estate is liable in the hands of the devisee for the payment of the testator's debts, and a creditor might have his debt enforced in equity against the devisee, or notice of outstanding debts might be given to the devisee before conveyance. But I am of opinion that a devisee without notice might sell, and a purchaser from him would take the title not subject to the testator's debts. Though the lands, while in the hands of the devisee, were subject to these debts, the purchaser would have a good title, and need not trouble himself to ascertain whether there were or were not debts of the testator still unpaid. This not being a specific charge on the property devised, and there being no notice of outstanding debts, I think the devisee could sell and make a good title. It follows that the second ground of objection must also fail.

We come now to the last ground. I do not think that the failure to register the writ matters in the least. There are two kinds of registration—the one to perfect a title, the other to prevent alienation; and it seems to me that the Examiners of Titles have confounded them. The 81st section of the District Courts Act provides that "no writ of execution under the Act shall bind any lands, unless registered." That means *binding* lands in such a way as to prevent alienation. Here no question has arisen between the purchaser from the Registrar and a purchaser without notice of the writ, and the section has no application. That ground must therefore fail.

On the whole, I am of opinion that the Registrar-General has failed to substantiate his objections, and that the application to bring the land under the Real Property Act should be proceeded with.

HARGRAVE, J. This will comes before us under a very useful section of the Real Property Act, and the Examiners have been quite right, under the circumstances, in bringing it before us. Now the first principle of testamentary law is that if a man by a document in writing, duly executed and attested according to law, disposes of his property, that property goes to the persons therein named. Here the will was apparently drawn by the testator himself; the paper it is written on is ruled for accounts, and was probably a page torn out of his shop-book. It is none the less a will because drawn by himself, and it is clear that he intended to avail himself of the Wills Act. The will consists of three sentences, each separated from the others and complete by itself. No question arises on the first sentence. No one can say that it is not a complete bequest. Then as to the second sentence, suppose it written *currente*

calamo without any blanks at all (and in this will there are no "blanks" in the true sense of the word; a "blank" means a space left in the line—not a space at the beginning or end of the line, as the spaces are here), it would be complete in itself. Very likely the testator put down his property first and then made up his mind whom to leave it to, and put "Thomas Richards" afterwards in the place where it is instead of after "unto." Still as it stands there is a perfectly complete devise; the subject matter and the donee are mentioned, and that is all that is necessary. Then it is said that we can put "her" in just as well as "his." But in the third sentence the testator speaks of "my said wife," and we must assume that he would use the same form of expression in the second. I think that it is a perfectly good devise to Thomas Richards. Putting the name of the donee after instead of before the subject matter makes no difference. I feel no doubt about it, and I think that it is not necessary either to supply or transpose any words.

There is no charge of debts in this will. All the cases cited are quite beside the question. There is no devise to the executrix; and a mere direction to pay debts, such as this is, creates no charge on the real estates. Why, in former times, if a man devised his real estate his creditors would have had no claim against it at all; and after a very celebrated case an Act was passed making lands devised assets in the hands of the devisee; but then the creditor must file his bill and have the estate administered in due course of administration. Then the direction to pay debts being in conjunction with the appointment of the executrix shews that the personalty was the fund from which she was to pay. I am clearly of opinion that there is no charge of debts at all in this will.

Upon the third point I concur with his Honor.

Sir W. MANNING, J. I concur on all the points. I take it, looking at the will, that there are only two "blanks" properly so called, the other spaces being interstices between paragraphs. First of all there is the paragraph dealing with the personal estate. Then a line is left. Then the second paragraph begins "I give, devise, and bequeath unto"; then a line is left for the name of the devisee; then the property is described; then a blank is left between "for" and "absolute use and benefit"; and then a line is left in exactly the same manner as after "unto." Now it is clear from this will that the testator meant to dispose of his personal estate, and also of his real estate at Hay; clearly he had no intention of dying intestate as to that. The Court must, therefore, supply any words that may be necessary to carry out the testator's intention, as the law always leans against intestacy. It was a pure accident, as I think, that the name of Thomas Richards was

put in the wrong line. But the name must be in the will for some purpose if it is to be an operative word at all. It has been contended that "Thomas Richards" ought to be put after "unto," and "her" inserted before "absolute use." But it seems to me that if he had intended to leave the land to his widow, and was only in doubt about a trustee, he would have put "her" in the blank space, and not have left it blank. The very object of leaving a blank was that it might be filled up afterwards, when he had made up his mind, with "his," "her," or "their," according as he decided to leave the property. I think the proper way of reading this devise is an absolute devise to Thomas Richards beneficially. No doubt the Registrar-General and the Examiners were right in raising the question. The Court can construe the will, but *they* could not, in the absence of judicial decision.

On the other point I agree with their Honors. If the contention put forward by the Examiners were right, a man might die with an estate worth £50,000, having left different portions of his real estate to different persons, and no one of the devisees could do anything with his share until it could be proved that every debt of the testator had been paid. It would be a terrible thing if that were the case, and I am glad that the Court sees its way to decide against such a contention. I quite admit that it would be open to a creditor to file a bill against the devisee; but here fifteen years have passed, and I do not think it quite within the province of the Examiners to raise so shadowy a question. It is a question of law based upon an altogether suppositious and improbable state of facts.

As to the third point I altogether agree.

Objections overruled.

Attorney for the Registrar-General—*Williams* (Crown Solicitor).

Attorneys for the applicant—*McCarthy, Robertson, & Fisher.*

EX PARTE COLLIER. (*a*)

Vagrant Act, s. 6—"*Insulting behaviour.*"

A. was convicted under section 6 of the Vagrant Act with using insulting behaviour towards B. B. was a coroner, and was late at an inquest to which A. was summoned as a juryman. A. said "It is hard to be summoned for 9 o'clock. B. could not attend because he had not his cows milked, and had to supply the stores with butter before he could attend to his business." After repeating these words he said "I'm not a toady and get no favours." He afterwards followed B. and said "I defy you!" and screamed after him.

Held, that the conviction was wrong.

Butler, Q.C., on the 30th of November, obtained a rule to shew cause why an order of Sir *W. Manning*, J., in Chambers, making absolute a rule *nisi* for a prohibition restraining all proceedings under a conviction of the applicant should not be set aside.

The applicant was charged before certain Justices, under s. 6 of the Vagrant Act (15 Vic., No. 4), with unlawfully using insulting behaviour towards W. T. Caswell, whereby a breach of the peace might have been occasioned. The depositions shewed that the applicant had been acting as juryman at an inquest, Caswell presiding as coroner. He said in Caswell's presence, "It is hard to be summoned for 9 o'clock. Caswell could not attend because he had not his cows milked, and had to supply the stores with butter before he could attend to his business." He repeated those, or similar words, several times. He then said "I'm not a toady and get no favours." Upon Caswell leaving the place he followed him some distance, saying, "I defy you!" and screamed after him. He was convicted and fined £3 or one month in gaol.

Butler, Q.C., and *Davis*, in support of the rule, referred to *Ex parte Godfrey* (*b*) and *Webb* v. *Knight* (*c*). The question of intent was one purely of fact for the magistrates; it was for them to judge whether the words were calculated to have the effect of causing a breach of the peace. The tone in which such words were uttered is a material element in considering their probable effect, and that could only be ascertained from the witnesses giving their evidence orally. The depositions merely shew the bare words, and do not convey the manner in which they were spoken. Besides, the behaviour was most clearly insulting, and was calculated to make any but a most forbearing man resent it with blows. The forbearance of the person insulted cannot be taken into consideration. A man has no more right to be abusive to a peaceable man than to one of violent temper. The consequence would be that people might be as abusive as they pleased to those whose positions prevented them from taking the law into

(*a*) December 7. (*b*) Wilkinson M. C. 75. (*c*) L. R. 2 Q. B. Div. 530.

their own hands. The only question is whether the words were such as would provoke an ordinary man to a breach of the peace —and we submit they were.

Darley, who appeared to shew cause, was not called upon.

HARGRAVE, J. It is said that the magistrates were the proper persons to judge of the character of the language used, but the very foundation of their jurisdiction is that the words, *per se*, must be abusive and insulting. What are the words complained of? I can see nothing abusive or insulting in saying that Mr. Caswell had his cows to milk and had to supply butter to the stores. Then followed language which might bring Mr. Caswell up to heat, but more than that is necessary according to the Act; the words must be calculated to occasion a breach of the peace. Then we are told of his uttering "a sort of screech." Well, there is nothing *per se* insulting in that. "Hooting" implies insult, but "a screech" does not. We cannot assume because a man swears that the behaviour of another was insulting, that, therefore, it was. It is not a question of fact at all, but a question of law for us upon the evidence.

FAUCETT, J. Apart from the words used here there was clearly no offence. As to the first words used, was not the defendant clearly justified in making the observation he did? Not only were the words not insulting, but they were clearly justifiable under the circumstances. No doubt Mr. Caswell was irritated at being found fault with in the discharge of his duty, but the words are not only not within the section of the Act, but they were amply justified by the coroner's conduct. Then as to the words "I'm no toady," are they insulting? Well, the charge as to them was given up, and what does the "behaviour" amount to? At first I thought that the "screech" spoken of might fall within the Act. But the section clearly applies only to conduct which, *in its natural consequences*, might be calculated to cause a breach of the peace to be committed, and I cannot think, under all the circumstances, that the "screech" was calculated to provoke Mr. Caswell to that extent.

Sir W. MANNING, J. In my opinion, this prosecution was a very unwise proceeding. The complainant began by being in the wrong, for he kept the defendant and his fellow jurymen an hour waiting. Then the defendant, who has been taken away a considerable distance from his home, is naturally annoyed and vexed, and talks about Mr. Caswell loudly enough to be heard. The words about "toady" I did consider offensive, and I can understand a man being angry at them. As to the "screech," I understand that was uttered when the defendant was on the ship and the complainant was on shore walking to his buggy.

There is no description of what the screech was like, and I cannot say that it was insulting. I cannot think that the words or behaviour of the defendant came within the Vagrant Act. The section in question must be construed with regard to the general tenor of the Act, which chiefly relates to low and disorderly characters.

Rule discharged with costs.

OLIVER *v.* SHEPPARD (*a*).

District Courts Act—Supreme Court Issue—Notice of Trial.

Though no notice is fixed for notice of trial of a Supreme Court issue in the District Court, the plaintiff must give notice a reasonable time before the intended day of trial. Where, therefore, a plaintiff gave notice on a Thursday, after the time fixed for demanding a jury, that the trial would take place on the following Saturday, and the defendant did not appear, the Court set aside a verdict given for the plaintiff, and granted a new trial.

Whether the notice of trial should be sealed? (*Quære.*)

When an order for the trial of a Supreme Court issue in a District Court has been obtained on the application of the defendant, the plaintiff has the carriage of the order, and it is his duty, within a reasonable time, to lodge the order, or a copy, with the Registrar of the District Court. (*Per* HARGRAVE and FAUCETT, JJ.)

MOTION to make absolute a rule *nisi* for a new trial in this action. The action was commenced in the Supreme Court. After issue joined an order was made by *Hargrave*, J., on the application of the defendant, that the trial of the issue should take place in the Mudgee District Court at the sittings to be held on the 17th of July. This order was made on the 22nd of June, and a copy was served on the plaintiff's attorneys on the 25th of June. On the 12th of July, which was the last day for demanding a jury for the approaching sittings of the District Court, Mr. Clarke, the defendant's attorney, applied to the District Court Judge, who was then in Mudgee, for information whether a day had been fixed for the hearing of the issue. The Judge informed Mr. Clarke that he had no knowledge of the case. Up to the 17th of July the order and issue were not lodged with the Registrar of the District Court. On that day the sittings of the District Court began. About six o'clock on the afternoon of Thursday, the 19th of July, Mr. Clarke was served with a notice intimating that the following Saturday had been appointed by the Judge for the trial of the issue. Mr. Clarke called the Judge's attention to the notice, complaining that it was informal, and also that no time was given to prepare for trial. The Judge

(*a*) December 5.

replied that Mr. Clarke must take it for what it was worth. Up to six o'clock on Saturday, the 21st of July, no entry of the issue or order was made in the minute book of the District Court as required by the 54th of the District Court Rules. Shortly after that hour on Saturday, the Judge, on the application of plaintiff's counsel, ordered the issue to be entered in the minute book for trial on that day. When the cause was called on, the defendant was called and did not appear. His attorney addressed the Court, and declined to appear on the ground that he had not received legal notice. The trial proceeded, and a verdict was given for the plaintiff.

The grounds on which the rule *nisi* was obtained were as follows:—1. That the defendant had not due notice of the trial in accordance with the District Courts Act of 1858. 2. That the defendant was, by the course pursued by the plaintiff, deprived of his rights to have the cause tried by a jury. 3. That the said cause was heard behind the back of the defendant, and without his having been offered a proper opportunity of being present and heard. 4. Upon the ground of surprise, and of the misconduct of the plaintiff in and about the conduct of the cause. These were the only grounds argued, though an affidavit stating the facts mentioned above was also relied upon.

Darley and *Pilcher*, for the defendant, in support of the rule. Section 98 of the District Courts Act of 1858, after giving power to a Judge to order the trial of a Supreme Court issue in the District Court, enacts that "thereupon the plaintiff shall lodge with the Registrar of such Court such order and the issue; and the Judge of such Court shall appoint a day for the hearing of the cause, notice whereof shall be sent by the Registrar to both parties, or their attorneys, in such manner as shall be directed by the rules of practice." A form of notice under this section is given in the schedule to the District Court Rules (Form 20); but no time is fixed by the Rules for the giving of such notice. The only Rule relating to Supreme Court issues is the 54th, which directs as follows:—"Where any action under section 98 of the Act is ordered to be tried in a District Court, the Registrar of the District Court mentioned in the order shall enter the same in the minute book of the Court for hearing on the day appointed by the Judge of that Court." The notice was not in the form given, nor was it sealed, and as the form is incorporated in the 98th section of the Act there was a breach of the Act itself. Neither the Act nor the Rules prescribe the length of notice of trial, but it cannot be that one day's notice of trial is sufficient. We submit that the same notice is required as in the Supreme Court. The action remains for all purposes except trial in the

Supreme Court, and where the statute is silent, is subject to all the incidents of a Supreme Court case. There is nothing in the action to shew that a defendant shall not be entitled to the same notice of trial as if the trial had taken place in the Supreme Court. *Balmforth* v. *Pledge* (*b*) shews that all the District Court Judge has to do is to try the case, and that he has no further jurisdiction over it. Even if the notice served was not a nullity, it was an irregularity, and that irregularity has not been waived.

Butler, Q.C., *Simpson*, and *Bennett*, for the plaintiff, shew cause. We do not contest the right of the Court to grant a new trial under the circumstances in this case as an indulgence to the defendant, but we deny that we have been to blame in any way. The reason why no time for giving notice of trial is fixed in the Act or Rules is obvious. It would be impracticable in these District Courts to prescribe any fixed notice. The day has to be appointed by the Judge, and notice afterwards given by the Registrar. District Court Judges are always travelling about the country, and it would be impossible to have a day appointed by the Judge at such a time as to admit of long notice of trial. Besides, the Judge in appointing a day must consider the rest of the business at the District Court, and he can only do that when the sittings are about to commence. Again, in the Supreme Court the length of notice of trial varies; according to circumstances it is 8, 10, or 14 days. Which is to be the proper notice in the District Court? But the order of the Supreme Court Judge removing the case for trial is the real notice of trial. Both parties knew that the trial would take place at the sittings of the Mudgee District Court which were to begin on the 17th of July, and the defendant ought to have been ready. The application to the District Court Judge to appoint a day for the trial was made on the very first day of the sittings. If there was not sufficient time, the proper course for the defendant was not to stand aloof, but to ask for more time, or to say that he wanted a jury. The defendant was bound to be ready to go to trial on the first day of the sittings, as the order of Mr. Justice *Hargrave* did not fix any particular day, but merely fixed the trial for the sittings. The fact that the original order was not filed cannot invalidate the proceedings. The section is directory and not imperative, and the failure to comply with its details does not make the whole proceeding invalid. In *Maxwell on Statutes* (*c*) it is said: "Where the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The

(*b*) L.R. 1 Q.B. 427. (*c*) p. 337.

neglect of them may be punishable indeed, but it does not affect the validity of the act done in disregard of them. To give them that effect would often lead to serious inconvenience and absurdity. Thus, to hold that an Act which required an officer to prepare and deliver to another officer a list of voters on or before a certain day under a penalty, made a list not delivered till a later day invalid, would in effect put it in the power of the person charged with the duty of preparing it, to disfranchise the electors; a conclusion too unreasonable for acceptance." And the case of *Reg* v. *Rochester* (*d*) is cited for this position. So here, if the construction contended for were adopted, it would put it in the power of the defendant, who has the carriage of the Judge's order, in all cases to defeat the order.

Darley, in reply. If the defendant had refused to give up the original order to the plaintiff, the latter could have obtained, on application to the Judge, a duplicate order. But even suppose he could not: if he had come to the Court and said that the defendant would not give him the order, the Court would have made a peremptory order for him to give it up. It is said that the plaintiff was not in fault. But the Act directs that when the order has been obtained, "the plaintiff shall *thereupon*" lodge it and the issue. He does not lodge them, even supposing the copy order sufficient, until the 19th of July. That delay was the cause of the whole difficulty. If they had been lodged before, the defendant would have known that the trial was going to take place, and would have prepared for it.

HARGRAVE, J. The rule which is always acted upon, when a party takes a judgment behind the back of the other party, is that he must shew that every step he has taken is strictly legal. Here, on the contrary, as it seems to me, he has taken several steps, which, to say the least of them, he must have known to be risky, and which make the judgment obtained a thorough nullity. In the first place, my order fixed the trial for the sittings at Mudgee on the 17th of July. The section of the Act says that the plaintiff shall "thereupon" lodge the order and issue with the Registrar. I shall assume that "order" means either the original order or a copy; still he must lodge one or the other "thereupon." That means at once. Until that is done the District Court has no jurisdiction. The jurisdiction, which that Court had not before, initiates with the lodging of the order and issue. Neither the District Court Judge nor the parties can deal with the cause until that step is taken. When that has been done, the Judge may appoint a day for the trial, "notice whereof," that is, of the day appointed, "shall be given by the Registrar to

(*d*) 27 L.J.Q.B. 45, 434.

the parties." But here it appears that a day was appointed, and notice given before the order and issue were lodged. They were not lodged until the 19th. Everything, therefore, done up to the 19th was invalid. We must read rule 54 with section 98. The plaintiff should at once lodge the order and issue with the Registrar, and the Registrar should enter the cause in the minute book, at any rate, before the last day for demanding a jury. Then the parties have notice that the cause is coming on for trial, and will be prepared to go on, and the Judge may fix the very next day for trial if he pleases. I cannot see that any step was taken by the defendant's attorney to waive his rights. It seems to me that the plaintiff, in his attempt to push his proceedings to the extreme verge of the law, has acted unlawfully throughout. I also concur with the argument that, under the circumstances, a day's notice of trial was altogether unreasonable. On three grounds—that every step taken by the plaintiff was void in consequence of the order not having been lodged; that the effect of his action was to prevent the defendant from having his case tried by a jury; and that a verdict behind the back of the defendant was, under these circumstances, a nullity—I think the rule for a new trial ought to be made absolute.

FAUCETT, J. I also think that a new trial ought to be granted. The whole course taken by the plaintiff in this case was unreasonable. In the first place, the order removing the issue from the Supreme Court was obtained on the 22nd of June and served on the 25th. The order having been served, what was the duty of the plaintiff? The defendant has not the carriage of the order, under the Act the plaintiff has it. He may either proceed or not proceed in the District Court as he thinks fit. The Act says that when the order is made, "thereupon," &c. What does "thereupon" mean? Surely it means within a reasonable time after the service of the order. Was it reasonable to wait for twenty-four days, and when the cause was to be tried on the 17th of July, not lodge the order till the 19th? And why is the defendant bound to do anything in the meantime? Why should he give notice of a jury? Any step he takes must be at his own risk, for the District Court is not seized of the matter until the order is lodged. Whether the original or copy order ought to be lodged is not material here, and I think that the defendant would be estopped from taking the objection that the copy served by him did not correctly represent the original order. The probability is that the Legislature intended that the original order should be lodged in order to give the District Court Judge jurisdiction; still, I cannot see why he should not accept a copy which had been served by the defendant, and to which the defendant,

therefore, could not object. At any rate, the lodging of the order or copy order is the first step that gives jurisdiction. Whatever the parties do before that is an absolute nullity, and, as a strict matter of law, the Judge is not entitled to give any directions at all before that has been done. I can see no reason for saying that Mr. Clarke was in fault. On the 12th, and again on the 17th, he inquires whether the order has been filed, and up to six o'clock on that day can get no information. Then he is served with notice by the Registrar, who does not seem to have been in fault or guilty of any delay. The appointment of a day for the trial was made by the Judge on the 17th, two days before he had any authority to make it. Mr. Clarke called the attention of the Judge to the notice, and the Judge left it to him to treat it for what it was worth. The notice gave only one clear day before the trial. It is impossible to hold that that was a reasonable notice. It is argued that no time is fixed by the Act or the rules for giving notice. But suppose notice was given one evening for the next day. Can anyone say that that would be reasonable? And this notice was nearly as unreasonable. The only difficulty which I feel in this case is that Clarke, being in Court, might have represented to the Judge that the time given to prepare for the trial was very short, and made a formal application to postpone the trial. Perhaps that would have been the best course; but was he bound to adopt it? I think not, after he had been prevented by the plaintiff's delay from demanding a jury. It seems to me, on the whole, that Clarke was not so wrong in the course he took as I was at first inclined to think. I think the plaintiff acted unreasonably in delaying to lodge these documents. They ought certainly to have been lodged within such a time as would enable parties to take all necessary steps for proceeding to trial. On the whole I am quite satisfied that a new trial ought to be granted.

Sir W. MANNING, J. I have had some difficulty on one or two of the points raised, but have come to the decision that the new trial ought to be granted on very broad grounds, independently of any small points. We have this fact broadly, that the defendant had no information of the plaintiff's intention to go to trial till the Thursday evening. It is almost against natural justice. If the plaintiff had gone to the Registrar on Tuesday and lodged the order, and had notice of trial served on the defendant at once, I think the defendant might have been bound to go on to trial on the Saturday. The issues were very simple, and the whole matter lay almost entirely within the knowledge of the plaintiff and the defendant. But that course was not pursued. The plaintiff, having got the order on Tuesday morning,

says nothing about it to the Registrar or the defendant till Thursday evening, and then leaves the defendant only one day to prepare for trial. It is not necessary to go into the other points; on some of them I might have had some difficulty.

Rule absolute with costs.

Attorney for plaintiff—*Dunn.*

Attorney for defendant—*Clarke* (by *Curtiss*).

EX PARTE BLAND. (*a*)

Articled Clerk—Assignment of Articles.

Where it appeared that the attorney to whom the applicant had been articled was dead, and that his executrix had refused to take out probate, the Court made an order for the assignment of the articles.

Darley moved on behalf of an articled clerk for an order for the assignment of the applicant's articles. He was originally articled to Mr. William Maguire, an attorney, who died in August, 1877, leaving a will, by which his widow was appointed executrix. The executrix refused to take out probate of the will, and shortly afterwards left the colony. He cited *Ex parte Lewis* (*b*).

PER CURIAM (*c*). Order as asked.

CHURCHILL *v.* WILLIAMS. (*a*)

Lessor and Lessee—Breach of Covenant to give possession on a particular day—Measure of Damages.

Where there had been a breach of a covenant to give possession on a certain day, and the action was brought a week afterwards, and the plaintiff had paid £30 as a bonus for the lease, which was for 7 years, the *Chief Justice* told the jury that in estimating the damages they might take into consideration the sum of £30, which had been so paid.

Held, that the direction was right.

DECLARATION. Count 2. Covenant in a lease to give possession of a house to the plaintiff. Breach, that "the defendant did not give possession of the said demised premises to the plaintiff upon the said 10th day of July last, but has wholly neglected and refused so to do." Averment of damages stating as special damage that the plaintiff lost the sum of £30, paid as a bonus by the plaintiff to the defendant in consideration of granting the lease.

(*a*) December 7. (*b*) 2 D. & L. 130. (*c*) HARGRAVE, FAUCETT, & Sir W. MANNING, JJ. (*a*) December 3.

3. Agreement by the defendant, in consideration of the payment by the plaintiff of £30, to execute a lease to him and give him possession of the premises. Breach, that "the defendant did not give possession of the said premises to plaintiff on the said day, but wholly neglected and refused, and since hitherto wholly neglects and refuses so to do."

PLEA. That the plaintiff in his second count is suing for and in respect of the same matter as he sues for in his third count, and that the defendant brings into Court the sum of £3 and says, &c.

From the evidence given at the trial before his Honor the *Chief Justice* at the August sittings, it appeared that on the 3rd of July, 1877, the defendant executed to the plaintiff a lease of a house and shop in Dowling Street, Woolloomooloo. The Term was to begin from the 10th of July. On the 10th the plaintiff did not get possession, but, as it was alleged at the trial, by his own fault, as he did not wish to turn out the former tenant. However, in consequence of the plea of payment into Court, that question became immaterial. No evidence of special damage was given, but it appeared that the plaintiff had paid the defendant a bonus of £30 for granting the lease. The plaintiff admitted that he was willing to consider the lease at an end if £25 out of £30 was returned to him, and offered to accept the £25. His Honor directed the jury that in estimating the damages they might take into consideration the payment of such bonus. A verdict was given for the plaintiff with damages £50. A rule *nisi* for a new trial was afterwards obtained on the grounds that the damages were excessive, and that there had been a misdirection.

Foster, in support of the rule.

Pilcher shews cause.

Sir JAMES MARTIN, C.J. In this case the defendant let to the plaintiff premises in Woolloomooloo for seven years. The plaintiff paid £30 as a bonus; he did not get into possession on the day agreed upon; and shortly afterwards commenced this action. Substantially the second and third counts allege the agreement, the payment of the £50 under it, and the continued refusal of the defendant to allow the plaintiff to go into possession. As to those two counts the defendant does not deny the alleged breaches, but pays £3 into Court. The effect of that is an admission that (in the words of the count) "the defendant wholly neglected and refused, and since hitherto wholly neglects and refuses" to give possession. No doubt the evidence of the plaintiff himself at the trial went to shew that there had been no breach, but that could not get rid of the effect of the payment into Court as an admission. No evidence was called for the defence, and the case went

to the jury upon the plaintiff's evidence. I told the jury that in estimating the damages they would be entitled to take into account the fact that £30 had been paid as a bonus. It was argued at the trial, and has been argued now, that an effective lease having been given, there was nothing to prevent the plaintiff from getting possession by turning out the former occupant. At first I thought there was something in that point, but *Phene* v. *Popplewell* (*b*) shews that the defendant was entitled to treat the conduct of the plaintiff as a surrender of his lease. The offer of the plaintiff to give up his lease must be regarded as a continuing offer until it was actually withdrawn, and therefore the defendant might at any time have treated the lease as terminated. Under these circumstances, I can see no injustice in the plaintiff recovering the £30 he had paid. The damages certainly appear to be high, but they are not so excessive that we are called upon to interfere with the verdict of the jury.

HARGRAVE, J. I think that the sum of £30 having been paid by the plaintiff in respect of the very property which was in question in this action was a circumstance which the jury could not leave out of their consideration. And that is all, as I understand, that his Honor's direction amounted to. When the jury came to the consideration of the amount of damages, it was a question for them.

FAUCETT, J. I can hardly say that I am satisfied with the verdict. The bonus of £30 was given in consideration of the whole term of the lease, while the evidence shewed that the plaintiff was kept out of possession a week at the most. Certainly the jury were entitled to take the circumstance of the £30 having been paid into consideration; but the damages are very large—certainly larger than I would have given under such circumstances.

Rule discharged with costs.

Attorneys for plaintiff—*Gannon & McLaughlin.*

Attorney for defendant—*Hellyer.*

(*b*) 12 C. B. N. S. 334.

COMMERCIAL BANKING COMPANY OF SYDNEY v. STRAUSS AND ANOTHER. (a)

Promissory Note—Alteration—Assent before and after maturity.

The defendants sent a note drawn at 4 months to B. to be indorsed and returned for their accommodation. B. altered the due date from 4 to 2 months, and discounted it without the knowledge or consent of the defendants. The note at the expiration of 4 months was presented by the plaintiffs and dishonoured. The defendants did not at first contest their liability on the note and paid £50 on account, besides entering into negotiations with the plaintiff to substitute other notes. On the trial the jury found that the defendants had assented to the alteration of the note both before and after maturity.

Held, that there was evidence from which the jury might find that the defendant assented before maturity.

Whether assent after maturity would make the note good?—*Quære.*

DECLARATION on a promissory note for £120, at four months, made by the defendants in favour of one Redgate, and indorsed by him to the plaintiffs.

PLEAS. 1. Traverse of the making; 2. As to £50, payment.

The substantial defence in this action was that there had been an unauthorised alteration of the note after it left the defendants' hands. It appeared from the evidence at the trial before Sir *W. Manning*, J., at the August sittings that the defendants had sent the note, which was then drawn at two months, to Redgate, with a request that he would indorse it and return it to them to be used for their accommodation. Redgate wrote in reply that as the note was useless for the purpose intended, he "had retained it," and forwarded a note of his own at three months, made in the defendants' favour, for their accommodation. Redgate's note was discounted by the defendants and duly paid at maturity. Redgate discounted the note sent to him by the defendants at the Commercial Bank at Glen Innes. When the note was presented for discount, the due date had been altered from two to four months. The defendants both swore that the alteration was not made when the note left their hands, nor was it made with their knowledge or consent. Early in April the defendants received a letter from Redgate informing them that their note would be due in a few days and that he was not in a position to meet it. The defendants wrote expressing their surprise at any note of theirs falling due at that time, as the note they had sent to Redgate was drawn at two months. On the 21st of April the note was presented for payment

(a) December 10.

at Inverell and dishonoured. On the 28th of April, the manager at Glen Innes wrote to the defendants as follows:—

"Sirs,

"Your immediate attention is requested to your dishonoured P.N. for £120, due the 21st inst. at the Bank of New South Wales, Inverell, and returned to me dishonoured. I have instructed our manager at Inverell with regard to this matter, and you will please call on him without delay.

"Yours faithfully,
"F. W. LONG,
"Manager."

To that letter the defendants replied in the following terms:—

"Dear Sir,

"In reply to your letter in reference to P.N. £120 overdue, we have seen Mr. Drake, and as there is nobody here with whom we are sufficiently acquainted to ask to indorse a bill, Mr. Drake thinks we had better send you a form (enclosed) for Mr. Bradbury to sign, and then Mr. Redgate can endorse below us and discount and take up the bill. We trust this arrangement will meet with your approval.

"We are, yours faithfully,
"STRAUSS & WRIGHT."

Neither to Mr. Long nor to Mr. Drake did the defendants state that the note had been improperly altered; but in a letter written on the 6th of May by one of the defendants to Mr. Long, he stated that "Strauss and Wright do not consider themselves liable for the amount of the bill: they have a good legal defence." They afterwards paid £50 on account, and never stated the nature of their defence, and the plaintiffs were first informed of the alteration having been made without the defendants' consent in a letter from the defendants' solicitor in July. This action was then brought, the negotiations as to fresh bills in substitution of the dishonoured note having fallen through. The jury gave a verdict for the plaintiffs with damages £77 9s. 4d., specially finding that Redgate altered the bill, and that the defendants assented to the alteration both before and after maturity.

In the 3rd Term, *M. H. Stephen* obtained a rule *nisi* for a new trial on the following grounds:—1. That the verdict was against evidence. 2. That his Honor was wrong in directing the jury that if the defendants gave Redgate their assent to the alteration in the promissory note after it had been negotiated by the plaintiffs, the verdict ought to be for the plaintiffs. 3. That his Honor was wrong it directing the jury that if the defendants assented to the alteration after the maturity of the note, the verdict ought

to be for the plaintiffs. 4. That his Honor should have told the jury that such assent would not be available to the plaintiffs unless given or, at least, communicated to them.

M. H. Stephen, in support of the rule. The holders took this note with the alteration on the face of it, and cannot recover unless the defendants consented to the alteration. *Downes* v. *Richardson* (*b*) and *Tarleton* v. *Shingler* (*c*) are relied upon on the other side. But in both those cases assent was given when the note was current, and to the holder of the note. Those authorities do not touch this case. *Outhwaite* v. *Luntley* (*d*) shews that an alteration extending the time avoids the bill just as much as one shortening it; and, also, that an altered note is void, even in the hands of an innocent indorsee for value. Here there is absolutely no evidence of assent before maturity. The only acts which can be construed into assent were done after the note was dishonoured. There was no communication at all between the defendants and the bank before the note fell due; and, even if the correspondence with Redgate is any evidence of assent to him, that was not communicated to the plaintiffs. Again, an assent after maturity would be without consideration, and could not bind the defendants.

Butler, Q.C., and *Darley* shew cause. This is a question of ratification, and consideration is immaterial. A ratification can be made at any time: *Beauchamp* v. *Waller* (*e*); *Ancona* v. *Marks* (*f*). The ratification relates back to the time of delivery. Besides, a subsequent admission of liability is evidence that at the time the alteration was made the holder had authority from the defendants to make it. In *Tarleton* v. *Shingler* the facts clearly indicate that the assent must have been given after the maturity of the bill. So in *Cariss* v. *Tattersall* (*g*), where it was held that the payment by the defendant of two years' interest on a promissory note was evidence that he had assented to the alteration, all the payment must have been made after maturity, for the interest would not accrue till the note fell due. The rule as to ratification is laid down correctly in *Storey on Agency* (*h*) and in the notes to *Armory* v. *Delamirie* (*i*). *Hilbury* v. *Hatton* (*j*) shews that full knowledge of the circumstances is not essential to ratification, and that assent should be given to the person who acted in the principal's name. Therefore, the assent was properly given in this case to Redgate, and not to the bank. The defendants' letters are abundant evidence that they assented before maturity. In writing to Redgate they merely express their

(*b*) 5 B. & Ald. 674. (*c*) 7 C. B. 812. (*d*) 4 Camp. 179. (*e*) 5 S. C. R. I. (*f*) 31 L. J. Ex. 163. (*g*) 2 M. & G. 890. (*h*) §§ 252, 253, 254. (*i*) 1 Sm. L. C. 256. (*j*) 33 L. J. Ex. 190.

surprise; they neither repudiate their liability on the note, nor refuse to pay it.

Stephen, in reply. The term "ratification" is altogether inapplicable here. There can only be ratification in the case of an unauthorised act done by an agent. Now Redgate was in no way the agent of the defendants, nor did he profess to act as such. The idea of principal and agent is excluded. [Sir JAMES MARTIN, C.J.: Does not the alteration purport to be made in the interest of the makers?] The rule that a party assenting before maturity is bound, is governed by the general principle of estoppel. The position of parties may be altered as long as the note remains current and there is an opportunity of negotiating it. But how does this apply after maturity? Then the rights of all parties are fixed and determined. Again, how can there be an estoppel if the assent was not communicated to the holder of the note before maturity? How would his position be changed in consequence? In *Cariss* v. *Tattersall* and *Tarleton* v. *Shingler* the payments and letters were relied on as evidence of a previous assent. But here the letters only go to shew an assent after maturity.

Sir JAMES MARTIN, C.J. [After stating the facts.] It seems to me that some confusion has arisen in this case between what is assent and what is evidence of assent. I am of opinion that an assent to an alteration given after maturity by the maker of a promissory note operates nothing against him; but he may do things after maturity which are evidence of a previous assent having been given. If, therefore, his Honor put it to the jury that if they thought the defendant assented after maturity, they ought to give a verdict for the plaintiffs, I think his Honor was wrong. None of the authorities go to that length. *Cariss* v. *Tattersall* has nothing to do with this case; the only questions there being whether an alteration in accordance with the original intention of the parties made the note void, and whether subsequent assent was evidence of such intention. *Downes* v. *Richardson* is a case in point. There the bill was altered without the consent of the acceptor, who, after he had been informed of the alteration, promised that the bill would be paid. The Court held that the statement that the bill would be paid, made before maturity, bound the acceptor. In *Tarleton* v. *Shingler* the report is a little ambiguous, but I think we are warranted in coming to the conclusion that the letters relied upon were written after maturity. Still, they were only material as evidence of a previous assent.

If the four months had expired, an assent afterwards would not make that promissory note the defendants' note, if it was not

so before. It appears to me, therefore, that his Honor was wrong in directing the jury that assent after maturity would make the note good. But the question is whether the verdict ought not nevertheless to stand. The jury found that there was an assent previous to maturity. It has been urged that there was no evidence of any such assent. At first I doubted whether there was any evidence; but I now think that there was, and that the verdict may be supported on that ground. On the 4th of April, Redgate, who altered the note, writes in these terms. [His Honor read the letter.] On the 13th one of the defendants replies. It is quite plain from his language that he knew the bill was drawn at two months. It was not a matter he had any doubt about; he states it as a fact. It is quite true that Redgate does not speak of the date on which the bill fell due, still, Wright, in answering that letter, knowing that the only bill they had given Redgate was a two months bill, knowing that it could not be falling due in April, does not repudiate it. All this was done before the note fell due. After it fell due the bank writes this letter. [His Honor read the letter.] In answer to that the defendants write the letter of the 29th of April. I am of opinion that that letter is to be regarded, not as an assent after maturity, but as evidence from which the jury were justified in finding that what was done by Redgate before maturity was sanctioned by the defendants. Upon these grounds I think that the verdict can be supported, and that this rule ought to be discharged.

HARGRAVE, J. I concur with the *Chief Justice* that this rule should be discharged. It is the universal rule in cases arising upon negotiable documents, that the interests of the holder are to be supported if possible. It is quite plain that the bill was not actually void. Indeed, the alteration was made before it was issued at all, for it could not be regarded as issued until it got into the bank's hands for value. Any alteration after that would have made the note a perfect nullity, but an alteration before it got into the hands of the bank did not invalidate the note. I quite agree that there was evidence of assent to the alteration, and I further think that assent at any time up to the trial is sufficient.

Sir W. MANNING, J. I also think that the verdict ought not to be disturbed. His Honor the *Chief Justice* thinks that I was in error as to assent after maturity. Having some doubt, I left specific questions to the jury, but I was prepared myself to recognise that assent afterwards might not have the effect of making the alteration binding. I do not think much of the refinements in the meaning of the word "assent." Whether we are to consider the conduct of the defendants as assent or as

ratification, I think, makes no real difference. The following passage from *Story* goes much more with my own opinion than the expressions in any of the cases: "But by far the largest class of cases of ratifications of unsealed contracts arises by implication from the acts and proceedings of the principal *in pais;* for it is by no means necessary that there should be any positive or direct confirmation. And for this purpose the acts and conduct of the principal are construed liberally in favour of the agent. . . . . . If a person should sign or indorse a note as agent for another, without authority, and the principal should afterwards, upon a full knowledge, promise to pay it accordingly, that would amount to a ratification of the act." Here the question is whether the acts of the parties amounted to an adoption by them of the note, whether you call it confirmation, or ratification, or assent. Now Redgate was quite entitled to retain the note, having sent one of his own to the same amount. He then alters it before it was negotiated, that is, before it was issued in a legal sense. The defendants, being informed that the note was falling due, were either silent or wrote the letter referred to. If they were silent, that was evidence from which the jury might presume assent. Redgate again wrote to them and received no reply. On the 21st of April the note was dishonoured, and Wright was informed of the alteration. It does not appear that he said anything about it at that time. When he writes he does not say that the alteration was made without his consent. Afterwards he sees the manager. There was not one word of repudiation, not a word on the subject of the alteration. I think there was plenty of evidence of assent, ratification, or confirmation, by whichever term it may be called. There was evidence that Wright meant to recognise it as his bill, not to repudiate it. I cannot see that there is any difference between what took place before maturity and what took place afterwards as evidentiary of assent.

Mr. *Stephen* has contended that the note when once altered was altogether bad, and was incapable of ratification. But can we say that this alteration made the note so complete a nullity that any promise to pay it afterwards was made without consideration? *Downes* v. *Richardson* is an authority for the contrary view. Mr. Justice *Bayley* says in that case:—"The alteration had vacated the acceptance, and gave him a right to say 'my name is off the bill;' but he may waive the benefit of such an objection, and I think he has done so, for I consider his assent as equivalent to a new acceptance" Where there has been an alteration which gives him the right to avoid the note, the question whether he has waived that right is not a matter of law, but

a matter of fact for the jury. And if the waiver is of a small thing, very much slighter evidence is necessary. In such a matter as an alteration extending the time from two to four months, anyone would be very ready to waive the benefit of such an alteration. Here there was abundant evidence that the defendants waived their right.

Rule discharged with costs.

Attorneys for the plaintiffs—*Want, Johnson, & Want.*

Attorneys for the defendants—*Allen* (by *Cape & Westgarth.*)

DIGEST

OF THE

MATTERS REPORTED

IN THIS VOLUME.

ABSENT DEFENDANTS ACT.

See DISTRICT COURTS ACT.

PRACTICE.

ACQUIESCENCE.

See PROMISSORY NOTE.

AFFILIATION ORDER. Upon an application for a maintenance order, the mother of the illegitimate child proved its paternity. The only other witness called proved that the reputed father had paid moneys under a former order in respect of the same child. *Held* (*per* HARGRAVE and FAUCETT, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that the order was not made "upon the oath of the mother only." *Ex parte* ROWAN - - - - - - - - - - - 321

AGENT, ADMISSION BY. A duplicate bank deposit-slip initialled by a clerk and coming from the possession of the plaintiff is admissible in evidence to prove a payment into a bank authorised by the defendants to receive payments on their account. (*Per* HARGRAVE, J., and FAUCETT, J.; *dissentiente*, Sir JAMES MARTIN, C.J.) *Per* Sir JAMES MARTIN, C.J.: A bank intrusted by a person with the duty of receiving money on his account has no authority to bind him by a receipt. An admission not on oath by an agent is only admissible when it is part of the *res gestæ*, or is made in the course of making a contract for his principal. A distress-warrant of date antecedent to the cause of action was admitted in evidence. *Held* (*per* HARGRAVE, J., and FAUCETT, J.; *dissentiente*, Sir JAMES MARTIN, C.J.), that it was rightly admitted. What constitutes sufficient evidence of payment to support the verdict of a jury. The cases of *Fairlie* v. *Hastings* (10 Ves. 126) and *Biggs* v. *Laurence* (3 T.R. 454) observed upon. CASEY AND WIFE *v.* WENTWORTH AND OTHERS - - - - - - - - - - 16

AGENCY, EVIDENCE OF.

See MALICIOUS PROSECUTION.

AGGRAVATED ASSAULT. J. was charged before Justices with an indecent assault, and an assault with intent to commit a rape. The evidence shewed indecent acts, but no serious

physical violence. The prisoner was convicted of an aggravated assault, and sentenced to three months' imprisonment with hard labour. Upon notice for a prohibition, *held*, that there was evidence before the Justices upon which they were justified in finding that the assault was one of an aggravated nature within the Act 18 Vic., No. 9, s. 1. *Ex parte* JONES - - - - - - - - - - - - - - - - 263

ALTERATION IN NOTE.

See PROMISSORY NOTE.

ARBITRATION. A submission to arbitration directed that the cost of the submission, reference, and award should be in the discretion of the arbitrators, "who may award by whom, to whom, and in what manner the same shall be paid." An award was made which was silent as to costs. *Held*, on motion for a *fi. fa.*, and an attachment for disobedience of the award, that the omission of the costs invalidated the award. *Re Warby and Rose* followed. But the Court (following *Morgan* v. *Smith*), upon an undertaking by the applicant to pay all the costs of the submission, reference, and award, made the rule absolute for a *fi. fa.*, and ordered the respondent to comply with the terms of the award. It is not competent to the Court, upon the motion for an attachment, to remit the award to the arbitrators under the power given by 31 Vic., No. 15, s. 16. By the submission the disputes were referred to two arbitrators, "or in case the arbitrators cannot agree in their award," then to an umpire. The award stated that the arbitrators had agreed to their award, "after full consideration of the matter in reference, in the presence of, and with the assistance of," the umpire; and the umpire signed the award as witness to the signatures of the arbitrators. *Held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dissentiente*), that these facts did not invalidate the award. The differences and disputes referred by the submission were stated to be "respecting the said partnership and the accounts thereof, and as to what amount A. B. is entitled to be paid for his interest in the partnership assets, and for money claimed to be due to him upon his withdrawal from the said partnership." The parties covenanted "to do and execute all such acts and deeds, matters and things, and to pay all such moneys" as the arbitrators, by their award, should direct and appoint. The award ordered the respondent, *inter alia*, to give a bill of sale over his stock-in-trade as a pawnbroker to secure the performance of the award. *Held*, that the ordering of such a security was not beyond the powers of the arbitrators. *Held*, also, *per* Sir JAMES MARTIN, C.J., and FAUCETT, J., that, though it is necessary in order to found a motion for attachment, that there should be an express order to pay the money, the same rule does not hold upon an application for a *fi. fa.* and the Act 5 Vic., No. 9, s. 43, but it may issue upon the *decision* of the arbitrators that a sum is due. *Re* BURNE AND KAVANAGH - - - - - - - - - - - - - - - - 254

ARTICLED CLERKS. Where, in consequence of a mistake, an articled clerk was not introduced to the Judges before he was articled, in compliance with the 10th Standing Rule, the Court permitted the introduction to be made *nunc pro tunc*. *Ex parte* CARRUTHERS - - - - - - - - - - 295

2. The Court directed the examination of an articled clerk whose articles would expire after the day of examination, but before the day fixed for the admission of attorneys. *Ex parte* READFORD - - - - - - - - - - - - - 152

3. The Court made an order assigning the applicant's articles, on its appearing that the attorney to whom he was articled was dead, and that his executrix had refused probate and had left the colony. *Ex parte* BLAND - - - - - - - 521

ASSAULT.

See CRIMINAL LAW.

ASSENT, EVIDENCE OF

See PROMISSORY NOTE.

ASSIGNMENT OF DEBT. The plaintiff in an action brought to recover £45, gave evidence that F., being indebted to him, had transferred to him a debt due from the defendant; that the defendant had agreed to the arrangement, and had at the time of such agreement been given an account shewing the amount due to be £55, and that afterwards the defendant had paid two sums of £5 on account, for which the plaintiff gave credit. The defendant's witnesses denied that any arrangement was made, and also stated that before the date of alleged arrangement, £25, for which credit was not given, was paid by the defendant to F. on account of the debt, so that £55 was not due from the defendant to F. at the time of the alleged transfer. The *Chief Justice* told the jury that at the time when the defendant agreed to pay the plaintiff the debt due to F., the amount of the debt must have been ascertained, in order to entitle the plaintiff to a verdict. The jury found a verdict for the plaintiff for £20. *Held* (on motion for a new trial on the ground that the verdict of the jury shewed that they thought the debt unascertained in amount), that the jury must be taken to have followed the *Chief Justice's* direction, and to have found that there was a legal assignment, though they deducted the £25 alleged to have been paid by the defendant before the transfer of the debt. *Semble*, that a count for money had and received will lie where the original debt transferred was not for money had and received. *Semble*, also (Sir W. MANNING, J., *dubitante*), that to constitute a novation there must be an ascertained amount actually due. ASH *v.* JONES - - - - - - - - - - - - - - - - 215

ATTORNEYS ACT. 1. It is not an offence within the Stat. 11 Vic., No. 33, s. 13, for a person not a barrister, attorney, or conveyancer, to draw a petition for the sequestration of an estate as insolvent, with the accompanying affidavit and schedule. The petition for sequestration is not a proceeding in the Supreme Court. A "proceeding at law" in the

statute means a proceeding in the Supreme Court. *Ex parte* SHOVELLER - - - - - - - - - - - - - - - 174

2. The 13th section of the Attorneys Act is intended to prevent persons from setting themselves up as attorneys, not from drawing agreements incidentally in the course of their ordinary business. Irrelevant charges being made in the applicant's affidavits, the Court on dismissing an application to punish H. for contempt, made the applicant pay the costs, though there was a *primâ facie* case against H. *In re* HASLINGDEN - - - - - - - - - - - - - - - - 416

BANKING CORPORATION. The Prothonotary refused to approve of the bond of the Commercial Banking Company of Sydney which was tendered as security for costs. *Held* (Sir W. MANNING, J., *dubitante*), that the Prothonotary was right. It is not necessary to state the grounds on which a rule *nisi* is obtained where they necessarily appear on the face of the rule. BUCKSTONE *v.* BENNETT - - - - - - - - - - 481

BANKER AND CUSTOMER. The plaintiff sued for the dishonour by the defendants of a cheque for £4. The first count was in the usual terms, and the second count alleged an agreement by the defendants to treat known good cheques paid in by the plaintiff as cash. To the second count the defendants pleaded *non-assumpsit*. The jury found a verdict for the plaintiff on the first count, and for the defendants on all the other issues. *Held* (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; Sir W. MANNING, J., *dubitante*), that as the only funds that could have been in the hands of the bank were cheques, and as the jury had found by their verdict on the second count that there was no agreement to treat cheques as cash, there must be a new trial. *Semble* (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.), that if, by the orders of a bank, the postmaster keeps letters till called for, a delivery to the post-office must be taken as a delivery to the bank, and the bank cannot set up the defence of not sufficient funds if a letter containing a remittance is lying at the post-office when the cheque dishonoured is presented. *Semble* (*per* Sir W. MANNING, J.), that if a customer of a bank sends a cheque and the remittance to meet it by the same post, he is not entitled to complain if the cheque is presented before the remittance is received, and is dishonoured. EDDY *v.* THE BANK OF NEW SOUTH WALES - - - - - - - - - - - - - - - - - - - 299

BILL OF SALE. J. and C. gave a bill of sale to the defendant to secure a *bona-fide* advance, and it was agreed that, to avoid registration under the Bills of Sale Act (19 Vic., No. 2), fresh bills of sale for the same consideration should be given by way of renewal within 30 days of each other. When the last three bills of sale were executed, J. and C. were actually insolvent. The last bill of sale was registered and possession was taken under it by the defendants. The estate of J. and C. was afterwards sequestrated. *Held*, in an action by the official assignee of J. and C. for the goods taken under the bill of sale, that the last bill of sale was a

security for a past debt, and therefore had the effect of preferring the defendants to other creditors within the 8th section of the Insolvency Act, and was void against the creditors. LYONS *v.* COHEN AND ANOTHER - - - - 92

CHARGE OF DEBTS.

See WILL.

COMMONS.

See TEMPORARY COMMONS.

COLLISION.

See MEASURE OF DAMAGES.

CONDITIONAL PURCHASE.

See CROWN LANDS ACTS.

COSTS.

See PRACTICE.

ARBITRATION.

ECCLESIASTICAL APPEAL.

FRIENDLY SOCIETIES ACT.

ATTORNEYS ACT.

SMALL DEBTS COURT.

CONSIDERATION.

See PROMISSORY NOTE.

INSOLVENCY ACTS.

CRIMINAL LAW. 1. A witness, having been sworn, was objected to by a juryman as incompetent. After examination, the Judge decided that he was incompetent, on the ground of want of religious belief, and allowed him to make the promise directed by the Act 40 Vic., No. 8, s. 3, and left his evidence, given after such promise, to the jury. The prisoner was convicted. *Held*, that the conviction was right. REG. *v.* MARY ANN LEWIS - - - - - - - - 8

2. It does not avoid the verdict of a jury in a case of felony if a juryman, after the jury has been sworn and before the prisoner is given in charge, is allowed to leave the Court for refreshment. Nor is it an objection to the validity of the verdict that an attorney assisting in the prosecution spoke during the trial to a juryman on matters unconnected with the case. REG. *v.* HAGGARD AND OTHERS - - - - - 12

3. A prisoner was convicted of an assault with intent to commit a rape. The evidence of the assault was that a woman awoke in the night, felt a hand on her bare right shoulder and found the prisoner (an aboriginal) lying behind her, in his shirt. *Held*, that the evidence was not sufficient to sustain the conviction. REG. *v.* CHARLIE COMBO - - 91

4. Upon the trial of an information charging the defendant with unlawfully and wilfully obstructing and hindering R., as messenger of the Chief Commissioner of Insolvent Estates, in making an attachment under the Chief Commissioner's warrant, the *Chief Justice* told the jury that it did not matter for the purposes of the prosecution whether the goods attached were the property of the insolvent or not, or whether they belonged to the defendant himself. The defendant was convicted. *Held* (*per* HARGRAVE and

FAUCETT, JJ.; Sir JAMES MARTIN, C.J., *dissentiente*), that such direction was wrong, and that the conviction should be quashed. REG. *v.* BRADBURY - - - - - - - - - 162

5. In one count of an information the prisoner was charged with feloniously and unlawfully wounding one M. A. J. with intent then feloniously, wilfully, and of malice aforethought, to commit murder. *Held*, that the count was good without alleging an intent to murder any particular person. *Regina* v. *Ryan* followed. In the third count the prisoner was charged with feloniously and unlawfully wounding one M. A. J. with intent then to inflict grievous bodily harm on M. J. M. J. was the wife of the prisoner. M. J. was tendered by the Crown as a witness, and HARGRAVE, J., admitted her evidence. *Held* (*per* HARGRAVE and FAUCETT, JJ.; Sir JAMES MARTIN, C.J., *dissentiente*), that the evidence was rightly admitted. REG. *v.* JONES - - - - - - - 170

6. Where the Attorney-General enters a *nolle prosequi* as to one of several prisoners jointly indicted, the Judge who presides at the trial is not bound to strike out the name of that prisoner wherever it appears in the information. REG. *v.* DUNCAN - - - - - - - - - - - - - - - - 170

7. Statements made in a prisoner's hearing are admissible in evidence against him, although the witness could not see the prisoner and had no opportunity of observing his demeanour. Whether such statements are admissible as part of the *res gestæ* where they do not tend to explain the acts done—*Quære*. REG. *v.* BURNS - - - - - - - - - - - - 183

8. Some stolen property was found in the possession of the prisoner, nearly twelve months after it was stolen. The prisoner, and his wife in his presence, gave inconsistent accounts of their possession of the stolen property. The Chairman told the jury that it would be for the jury to consider whether the account given by the prisoner and his wife, taken in connection with the other facts of the case, was a reasonable one or not, and if not, then they might convict the prisoner. The prisoner was convicted. *Held*, that the Chairman's direction was right. REG. *v.* ALLISON - 202

9. The defendant was charged in the information with unlawfully and maliciously wounding one J. B. The Chairman of Quarter Sessions told the jury that the defendant might, upon that information, be found guilty of an assault occasioning actual bodily harm, and the jury found a verdict accordingly. *Held*, that the Act 16 Vic., No. 18, s. 28, did not create new offences, but provided an additional punishment for offences then in existence. *Held*, also (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; Sir W. MANNING, J., *dubitante*), that the conviction could not be supported, as the information did not contain a special count for an assault occasioning actual bodily harm. REG. *v.* JENKINS - - - - - - - - - - - - - - - - 295

10. Upon a trial for horse-stealing, the prosecutor, in answer to questions put in cross-examination, swore that he was a duly qualified medical man, and that his name as such was in the Registry of the Medical Board of New South Wales.

Perjury was assigned on these statements, and he was convicted. *Held*, that conviction was wrong. REG. *v.* SWIFT 325

11. The information charged the defendant with obtaining money by a false pretence, viz., a representation that a worthless document was a good and valid cheque. The pretended cheque was actually presented, not by the defendant, but by R., in his presence. There was evidence of a preconcerted design on the part of R. and the defendant. The Chairman directed the jury that, if it were established by evidence that the scheme was arranged between the defendant and R. from the first, that they were both influenced by a common object, and mutually assisted in carrying it out, and that the one as well as the other obtained part of the spoil at the time the cheque was cashed, then the defendant, as well as R., would be guilty under the information. *Held*, that the direction was right, and that the defendant was properly convicted. REG. *v.* KNOWLING - - - - - - - - - - - - - - - - 329

12. The provisions of the Act 3 Geo. IV., c. 114, imposing the punishment of hard labour in certain misdemeanours, are in force in the colony of New South Wales. The question of the legality of a *sentence* cannot be reserved under the 13 Vic., No. 8. REG. *v.* THOMPSON - - - - - - - - - 454

13. Subsequent acts of a woman who receives stolen goods from her husband are not evidence to shew such independent activity on her part at the time of receiving the goods as will rebut the presumption that she was acting under the coercion of her husband. (*Dubitante*, Sir W. MANNING, J.) Whether the presumption is conclusive, *quære*. REG. *v.* JOURDAIN AND CROTTI - - - - - - - - - - - - 465

CROWN LANDS ACTS. 1. To a declaration for trespass to the run of the plaintiff, a pastoral tenant of the Crown, the defendant pleaded that the *locus in quo* had been duly reserved from sale for the preservation of timber, and justified the trespasses under licenses to cut timber on such reserve. *Held*, a bad plea (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.). Land reserved from sale under the 4th section of the Crown Lands Alienation Act for the preservation of timber are not "Crown lands" within the meaning of the 31st section of the Crown Lands Occupation Act, which empowers the Governor to issue licenses. *Per* FAUCETT, J.: Such lands are "Crown lands" within the meaning of the Crown Lands Occupation Act, but the Government having reserved them for the preservation of timber is not at liberty to issue licenses to cut the timber upon them. PER CURIAM: Such licenses confer no right to cut timber on a timber reserve. The plea alleged that the D. & M. Railway Company applied for and obtained special permits or licenses for cutting and removing timber, and that certain of the said licenses and permits were handed over to certain timber-cutters to enable them to cut and remove timber. In the rejoinder it was stated that each of the said timber-cutters had a separate license, and that the same had not been transferred within the meaning of regulation 96.

Semble (*per* HARGRAVE and FAUCETT, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that there was no departure. RICKETSON *v.* BARBOUR - - - - - - - - - - - - 72

2. The plaintiff's application for a conditional purchase described one of the boundaries as a line running north-easterly. On the trial of an action brought against the defendant, the lessee of a run, for trespass to the plaintiff's conditional purchase, the *Chief Justice* directed the jury that, inasmuch as there was no "frontage" to the plaintiff's land, a north-easterly line was one which the Act did not allow, and that his application was therefore void, and directed a verdict for the defendant. The jury found a verdict for the plaintiff. *Held (per* HARGRAVE and Sir W. MANNING, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that the direction was wrong, and that the verdict was not against the evidence. W. JOACHIM *v.* O'SHANASSY - - 98

3. Plaintiff, a conditional purchaser, sued defendant, a squatter, for trespass. At the trial the *Chief Justice* told the jury that the substantial question for them was, whether the plaintiff occupied within a month from the date of her application. If she did, she was entitled to recover; if not, the verdict ought to be for the defendant. *Held (per* HARGRAVE and Sir W. MANNING, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that such direction was wrong. *Per* Sir W. MANNING, J.: The plaintiff must shew actual possession of the *locus in quo* before the acts of trespass complained of. *Per* HARGRAVE, J.: The *onus* of proving the breach of any of the conditions is on the trespasser, and the lessee is in no different position from a stranger. ANNIE JOACHIM *v.* O'SHANASSY - - - - - - - - - 118

4. W. JOACHIM *v.* O'SHANASSY and A. JOACHIM *v.* O'SHANASSY - - - - - - - - - - - - - - - - - - - 143

5. The plaintiff, with others, lodged an application for a mineral conditional purchase, under s. 19 of the Crown Lands Alienation Act of 1861, of lands described as follows :—"County of Bathurst, parish of Bracebridge, 40 acres, about one mile E. of road from Spring Vale to James Park, and about a mile in a S. direction from Markham and West's copper lease, to be taken as marked by applicants." Certain land, not in the parish mentioned, and to the N. of Markham and West's copper lease, was marked by the applicants, and was being worked by them at the time of the application. *Held (per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*), that without the words "to be taken as marked," the description was void for uncertainty, but that with these words it was capable of being rendered certain, and that the Judge was justified in leaving the question of identification to the jury. *Per* HARGRAVE, J.: The description without the words referring to the marking was in sufficient compliance with the requirements of s. 13. *Held*, also, that the words "to be taken as marked" controlled the inconsistent words of the description. After the

plaintiff's application a mineral lease of the same land was granted to the defendant, who ejected the plaintiff. Before the expiration of three years from the date of the application the plaintiff went to the office of the Minister for Lands and was told by a clerk there that it was useless to tender the balance of the purchase money. The plaintiff consequently did not pay it into the Treasury. In an action of ejectment brought by the plaintiff against the defendant it was objected that the land had reverted to the Crown, under s. 18, upon the default of the plaintiff in payment of the balance. *Held*, that the plaintiff was entitled to maintain ejectment, because (1) *(per* TOTAM CURIAM) the land does not revert under s. 15 until the Crown has made a declaration of forfeiture; (2) *(per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.) because the Crown had dispensed with the tender of the balance by wrongfully issuing a lease and repudiating the plaintiff's title, and by the statement of the officer in the Lands Department that a tender would be useless. MARTIN *v.* BAKER - - - - - - - - - - 418

6. The defendant applied to conditionally purchase land which he described in his application as follows:—County of Bourke, parish of Berimbed; 40 acres situated between the 16 and 17 mile trees on the road from Narandera to Wagga Wagga, and includes two small sandhills and waterhole. *Held* (Sir JAMES MARTIN, C.J., *dissentiente*), that taking into consideration the facts that the defendant had occupied and improved the land, and that he had continued to pay interest on the balance of the purchase money, which had been accepted by the Government, and that the evidence did not shew that there were other sandhills or waterholes in the neighbourhood of the selection, the description in the application was sufficient. FLOOD *v.* LONGFORD - - - 449

DEFAMATION. In an action for libel in a District Court the Judge told the jury that if they believed that the defendant used the language complained of, or language to the same purport and effect, the plaintiff should have a verdict. *Held*, that such direction was wrong The District Court Judge ruled that the word "robbed" imputed an indictable offence. *Held (per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; *dissentiente*, Sir W. MANNING, J.), that it ought to have been left to the jury to say whether the word in the sense in which it was actually used imputed an indictable offence. The District Court Judge directed a jury to be summoned for the trial of the action pending in the Court by selecting each tenth person on the jury list until the requisite number was obtained. *Held (per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; *dissentiente*, HARGRAVE, J.), that this manner of summoning jurors was not illegal. SHEPPARD *v* DUNN - - - - - - - - - - - - - - - - - 486

DETINUE. Plaintiff, as official assignee of W., made a contract with defendant for the sale of an engine belonging to W.'s estate. He then applied to the Chief Commissioner of Insolvent Estates for his approval of the sale. The Chief

Commissioner made no direction. *Held*, that no interest passed to the defendant by the sale. Plaintiff afterwards sold the engine, which at the time was in the possession of the defendant, to V. at auction, and guaranteed delivery. *Held (per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*), that notwithstanding the guarantee to deliver, the property in the engine passed to V. immediately upon the sale, and that, the right of property being out of the plaintiff, he could not succeed in an action of detinue against the defendant upon the issue of not possessed. *Semble* (*per* Sir W. MANNING, J.), that a prospective general assent to a private sale being had would preclude the Chief Commissioner from disaffirming a particular sale, except on the ground of fraud. SANDEMAN *v.* ROBINSON - - - - - - - - - - - - - - - - - - 382

DISHONOUR, NOTICE OF

See PROMISSORY NOTE.

DISPENSATION WITH TENDER.

See MORTGAGOR AND MORTGAGEE.

DISTRICT COURTS PRACTICE. B. was the owner of M. Station in the G. district, and visited it every year for two or three months at shearing time. In the winter of 1875 he went there and remained till the winter of 1876, but left a month before certain trespasses, for which he was sued in the District Court at G., were committed, and had not since returned. His son was living at the station and managing it for him. B. had lived for 34 years, and was still living, with his wife and family, at Sydney. The plaint in the District Court at G. came on for hearing on the 1st of February, when B. objected to the jurisdiction on the ground that he was resident in Sydney, and not at M. The District Court Judge held that he had jurisdiction, but adjourned the case till the next sittings on the 19th of June, to enable B. to apply to the Supreme Court. On the 11th of June B. obtained a rule *nisi* for a prohibition returnable on the 19th, and on that day it came on for argument. *Held (per* HARGRAVE and FAUCETT, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that B. was "resident" within the G. district for the purposes of the District Courts Act of 1858, s. 5. *Held*, also (*dissentiente*, Sir JAMES MARTIN, C.J.), that the application for a prohibition under these circumstances ought to have been made within a reasonable time, and that B. was precluded by his delay in making the application. *Ex parte* BROUGHTON - - - - - - - - 189

2. A District Court Judge trying an issue in the Supreme Court sent down to the District Court under a Judge's order, has power to find a verdict under the Absent Defendants Act, s. 19, against one of several defendants jointly sued. If the verdict be found for the plaintiff against one defendant simply, the Supreme Court can amend the judgment signed upon such verdict by entering judgment for the other defendants. BRAY *v.* TAYLER - - - - - - - - - - 201

3. Upon a motion on notice to set aside a nonsuit at thetrial of a Supreme Court issue in the District Court, the notice being given after the time for filing a memorandum had expired, *held*, that the proper course was to file a memorandum and apply for a rule *nisi* in the first instance, as in the case of a trial in the Supreme Court. MOSCROP *v.* JACOBS - 324

4. A case on appeal from the District Court was struck out with costs upon its appearing that security had not been given. TRIMBLE *v.* HILL - - - - - - - - - - - - 405

5. A District Court Judge ordered the twelve jurors directed by s. 54 of the District Courts Act to be summoned for the sittings of the District Court, to be selected by taking every tenth name on the jury list, until twelve were obtained. Upon a plaint, which was to be tried by a jury, being called on, the defendant objected that the jury had not been properly summoned. The Judge overruled the objection. Upon a motion for a rule *nisi* for a prohibition, *held*, that, if the Judge had been wrong, his decision ought to have been questioned by appeal, and not by prohibition. The Registrar of the District Court summoned the jury in a way different from that directed by the Judge, and also from that prescribed by the Act 11 Vic., No. 20. This was only ascertained after the trial. *Held*, that before coming to the Supreme Court for a prohibition, an application ought to have been made to the Judge to grant a new trial on the ground of the improper summoning of the jury. *Ex parte* DUNN - 293

6. Though no time is fixed for notice of trial of a Supreme Court issue in the District Court, the plaintiff must give notice a reasonable time before the intended day of trial. Where, therefore, a plaintiff gave notice on a Thursday, after the time fixed for demanding a jury, that the trial would take place on the following Saturday, and the defendant did not appear, the Court set aside a verdict given for the plaintiff, and granted a new trial. Whether the notice of trial should be sealed?—*Quære.* When an order for the trial of a Supreme Court issue in a District Court has been obtained on the application of the defendant, the plaintiff has the carriage of the order, and it is his duty, within a reasonable time, to lodge the order, or a copy, with the Registrar of the District Court. (*Per* HARGRAVE and FAUCETT, JJ.) OLIVER *v.* SHEPPARD - - - - - - - 515

DISTRICT COURT JUDGE. Plaintiff, a District Court Judge, sued the Colonial Treasurer (as nominal defendant) for a portion of his salary as such Judge. The defendant pleaded that the plaintiff was not ready and willing to, and did not, in fact, render his services as District Court Judge; and also, by way of cross action, that the plaintiff neglected and refused to perform his duties, by reason whereof the Government was compelled to employ a barrister to perform the plaintiff's duties in his place. On demurrer, *held* (by Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J.,

dissentiente), that these pleas were no defence to the action. *Per* HARGRAVE, J.: The pleas are good because they shew plaintiff's claim was not "just," within the terms of s. 1 of the Claims against the Colonial Government Act. MEYMOTT *v.* PIDDINGTON - - - - - - - - - - - - - - - 306

ECCLESIASTICAL APPEAL. In considering whether the executors of a will, who unsuccessfully oppose a later will, are entitled to their costs out of the estate, the Court will see whether there were reasonable grounds for their opposition, and whether there was undue litigation. It will not deprive such executors of their right to be paid their costs of unsuccessful opposition out of the estate, if in the course of the litigation charges of fraud against the parties propounding the later will are made, though such charges fail, so long as they were made *bonâ fide* and there were reasonable grounds of suspecting fraud or forgery. (*Per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*.) *Per* HARGRAVE, J.: Executors of a will are justified in putting the parties who propound a later will to proof in solemn form, but if they bring forward charges of fraud, which they fail to prove, they should be visited with the costs. ROCHESTER *v.* SULLIVAN - - - - - - - - 406

EJECTMENT.

See STATUTE OF LIMITATIONS.
PRIVY COUNCIL APPEAL.
CROWN LANDS ACTS.

EXECUTORS AND ADMINISTRATORS.

See SMALL DEBTS COURT.
ECCLESIASTICAL APPEAL.

FALSE PRETENCES.

See CRIMINAL LAW.

FIRE INSURANCE. Goods intended to be insured must be specified, either by description, or by reference to the locality where they are kept, so as to be capable of identification. Where, therefore, the Judge told the jury that a certain contract to grant a policy covered certain stock-in-trade and furniture, not specified and described in the contract, wherever they might be, *held*, that the direction was wrong; but a new trial refused on the ground that under the circumstances of the case the ruling was immaterial. In a proposal for a fire insurance on a stock-in-trade and furniture, opposite the printed words—"Describe the construction of the buildings," was written—"Brick and slate roof." A ground plan was attached, shewing a space at the rear of the brick dwelling-house covered with buildings marked as "sheds and workshops—hardwood palings and galvanized iron roofs." Outside the lines enclosing the space was written—"detached." *Held*, that the proposal, taken with the ground plan, did not contain any representation that the goods to be insured were contained in a brick building roofed with slate. *Per* Sir JAMES MARTIN, C.J.: The

printed questions in the forms of proposals used by insurance companies are not conditions; and if the company accepts a proposal in which answers are not given, though required, the company is bound by the contract so made. McLauchlan *v.* Standard Fire Insurance Co. - - 224

FOREIGN COMPANY. By an Act of the Legislature of Victoria, it was provided that the full benefit of all contracts made with any persons on behalf of a company carrying on business in Victoria should vest in the chairman for the time being, and also that all actions, suits, &c., should be brought in his name. The defendant made in Victoria a covenant with certain persons on behalf of the company. *Held*, that the chairman of the company could maintain an action in New South Wales for a breach of this covenant. Anderson *v.* Johnson - - - - - - - - - - - - - - - 1

FOREIGN JUDGMENT. Where a defendant, resident in New South Wales, made a contract in Queensland, was sued in Queensland, after his return to New South Wales, was served with process in Sydney but did not appear, and judgment was signed against him, the Court refused to issue execution against him upon a memorial of the judgment under the Act 19 Vic., No. 12. The Brisbane Oyster Fishery Co. *v.* Emerson - - - - - - - - - - - 80

FORFEITURE.

See Crown Lands Acts.

FRIENDLY SOCIETIES ACT OF 1873. G. sued the trustees of a friendly society in the Metropolitan District Court for arrears of sick pay. The District Court Judge gave a verdict for the defendants, with costs against the plaintiff. G. applied to *Faucett*, J., for a writ of prohibition to restrain proceedings to enforce the costs on the ground that the District Court Judge had no jurisdiction to decide questions under the Friendly Societies Act, and had therefore no power to award costs. *Faucett*, J., refused the application. On appeal, *held*, that the District Court Judge had jurisdiction to award costs against the plaintiff in that Court, whether he had jurisdiction in the subject matter of the complaint or not. *Ex parte* Guest - - - - - - 284

GOVERNMENT, ACTION AGAINST. It was resolved by the Legislative Assembly that an address should be presented to the Governor, praying that His Excellency would be pleased to cause to be placed on the Estimates for 1874 a sum of money, to be ascertained by arbitration, to compensate the plaintiff for damages sustained by him. The Governor accordingly directed a reference, and the arbitrators awarded, "that there be paid by the Government to the said James Twaddell [the plaintiff] the sum of £4,600 for damages sustained by him." The plaintiff now brought an action of debt upon the award against the Government. *Held*, on demurrer, that the award was *ultra vires*, and that the plaintiff's declaration could not be supported. Twaddell *v.* Driver - - - - - - - - - - - - 459

HUSBAND AND WIFE.
See CRIMINAL LAW.

IMPOUNDING ACT. A person lawfully impounding under the Act 29 Vic., No. 2, is not liable for the improper state of the pound (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.). A declaration alleged that the defendant seized and took certain sheep of the plaintiff and impounded them in a yard unfit and improper for such purpose. *Held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.), that a plea justifying the seizing and taking under the Impounding Act was a sufficient answer to the whole declaration, as the allegation that the sheep were impounded in an improper pound was mere matter of aggravation. *Wilder* v. *Speer* and *Bignell* v. *Clark* distinguished. RAND *v.* WILLIAMS - - - - - 350

INSOLVENCY ACTS. To a declaration by the official assignee of an insolvent estate, containing counts framed under sections 6 and 8 of the Insolvent Act, in respect of a promissory note for £150 10s. 9d., delivered by the insolvents to the defendants, it was pleaded that the insolvents paid with the said promissory note for certain goods then sold and delivered to them by the defendant to the value of £42, and also a then previously owing debt of £75 17s. 6d., and the defendant also at the same time gave in cash to the insolvents the balance of the money represented by the said promissory note, and that the plaintiff had never offered to repay to the defendant the difference or balance between the said sum of £75 17s. 6d. and the full amount of the promissory note. *Held*, a bad plea. *Wilson* v. *Coberoft* and *Levy* v. *Smith* followed. LYONS *v.* SAMUEL - - 177

INSOLVENCY APPEAL. The time for appealing from an order of the Chief Commissioner refusing a certificate runs from the date of the making of the order. *Ex parte* MEYER - 319

INSPECTION OF DOCUMENTS.
See PRACTICE.

INSULTING BEHAVIOUR.
See VAGRANT ACT.

INTERFERENCE WITH COURSE OF POST.
See BANKER AND CUSTOMER.
PROMISSORY NOTE.

JURY.
See DISTRICT COURTS ACTS.

JURISDICTION.
See PRACTICE.
SMALL DEBTS COURT.
DISTRICT COURTS ACT.
FOREIGN JUDGMENT.
PRACTICE.

LARCENY.

See CRIMINAL LAW.

LESSOR AND LESSEE.

See MEASURE OF DAMAGES.

LIMITATIONS, STATUTE OF. In an action of ejectment it was proved, on behalf of the defendants, that one W. occupied a portion of the land claimed, an area of 2560 acres, that he built a house upon it, cultivated a few acres, split timber upon, and allowed his cattle to run over the whole land, and stated that he intended to occupy it. There was no evidence that the boundaries were marked, or that W. knew where they were. The jury found a verdict for the defendants. *Held* (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; *dissentiente*, FAUCETT, J.), that the verdict could not be supported. What are sufficient acts of possession to make out a title under the statute?—*Quære*. LAING & OTHERS *v.* BAIN & OTHERS - - - - - - - - - - - - - - - 28

2. ILLIDGE & ANOTHER *v.* LEARY & ANOTHER - - - 139

MALICIOUS PROSECUTION. The Bank of New South Wales is a joint stock company incorporated by a private Act, 14 Vic. *Held* (*per* HARGRAVE and Sir W. MANNING, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that an action of malicious prosecution may be maintained against the bank. *Held*, also (*dissentiente*, Sir JAMES MARTIN, C.J.), that the acting manager of the bank had an authority implied by law to bind the bank by his acts, and that the bank was liable for a prosecution instituted by him. As to the liability of the bank for the acts of their general solicitors prosecuting without special instructions?—*Quære*. OWSTON *v.* BANK OF NEW SOUTH WALES - - - - - - - - - 36

MANAGER OF BANK.

See MALICIOUS PROSECUTION.

MARINE INSURANCE. To a count for a policy of insurance on a vessel "at and from the 11th day of May, 1876, to the 10th day of May, 1877, whilst engaged on a pearl-shell, beche-de-mer, and trading voyage in and about Torres Straits and adjacent islands," and containing a stipulation that it was issued "under the same conditions as to seaworthiness as a voyage policy," the defendant pleaded that the said ship sailed on the said voyage, and continued in the said state and condition up to, and inclusive of, the time of the loss. *Held*, a good plea. The 2nd count was on a policy of insurance upon cargo "at from Somerset *via* Cooktown to Sydney upon any kind of goods and merchandise whatever loaden or to be loaden in the good ship or vessel called the 'Tui Lau,' beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship or vessel at as aforesaid." A plea "that the said pearl and tortoiseshell was not loaded on board the said ship at Somerset, but, on the contrary, prior to her arrival thereat, was *held* (*per* HARGRAVE, J., and FAUCETT, J.; Sir JAMES

MARTIN, C.J., *dissentiente*) a good plea. PER CURIAM: A parol agreement entered into before the execution of the policy cannot vary or control the terms of the policy. PER CURIAM: It is immaterial whether the plaintiff knew of the unseaworthiness alleged in the plea to the 1st count or not. BELL *v.* MILLER - - - - - - - - - - - - - 331

MARRIED WOMAN.

See CRIMINAL LAW.

MEASURE OF DAMAGES. 1. M.'s sheep trespassed on C.'s land. There was evidence that the sheep ate off the whole of the grass. A drought supervened, and the grass did not grow again. After action brought some 2000 sheep belonging to C. died. *Hargrave*, J., directed the jury that if the deaths of the sheep resulted from the grass having been eaten by the sheep of the defendants, the jury should take that into consideration in estimating the damages. *Held* (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; Sir W. MANNING, J., *dubitante*), that the direction was right, and a rule *nisi* for a new trial on the ground of misdirection refused (Sir W. MANNING, J., *dissentiente*). CHALLONER *v.* M'PHAIL - 157

2. The plaintiff sued for damages for the running down of his yacht by a steamer belonging to the defendants. At the trial Sir *W. Manning*, J., told the jury that if they found that the yacht was not worth repairing, they might give the plaintiff a verdict for the full value, and that the defendants might retain the remains of the yacht. The jury found that the yacht was not worth repairing, and found a verdict for the plaintiff for £300, estimating that as the full value of the yacht. *Held*, that the direction was right. *Held*, also, that if a plaintiff claims as for a total loss and recovers a verdict on that footing, he cannot afterwards maintain an action of trover against the defendants for the hull, spars, &c., of the vessel which remain in their hands. After the yacht was run down and sunk, the defendants raised her. The defendants' manager promised to send her to the yard of L., a boatbuilder in whom plaintiff had confidence, but afterwards had her taken to another wharf, put on shore there, and afterwards taken away to another boatbuilder's, and again removed without any notice to the plaintiff. *Held* (*per* HARGRAVE, J., *semble*, *per* Sir W. MANNING, J.), that these facts were evidence of a conversion by the defendants. KING *v.* THE BULLI COAL CO. - - - - - - - - - - 389

2. Where there had been a breach of a covenant to give possession on a certain day, and the action was brought a week afterwards, and the plaintiff had paid £30 as a bonus for the lease, which was for 7 years, the *Chief Justice* told the jury that in estimating the damages they might take into consideration the sum of £30 which had been so paid. *Held*, that the direction was right. CHURCHILL *v.* WILLIAMS - - - - - - - - - - - - - - - - - 521

MINERAL SELECTION.

See CROWN LANDS ACTS.

MISREPRESENTATION.

See FIRE INSURANCE.

MISTAKE OF COUNSEL. No memorandum stating the grounds on which a rule *nisi* for a new trial would be moved for was filed in consequence of the erroneous advice of counsel that it was unnecessary. *Held*, that this was not a sufficient ground for giving leave to file the memorandum *nunc pro tunc*. RICKETSON *v.* BARBOUR - - - - - - - - - - 453

MORTGAGEE AND MORTGAGOR. 1. A mortgagee can sue on the covenant to pay after exercising his power of sale. THROSBY AND OTHERS *v.* KEIGHRAN - - - - - - - - 141

2. The defendants, being mortgagees, demanded, under s. 55 of the Real Property Act, from the plaintiff, the mortgagor, the sum of £20,029 8s. 3d. as the amount due as principal and interest on certain mortgages held by them. A letter from the defendants' attorneys, sent at the same time as the notice of demand, contained the following passage:—"We must give you distinctly to understand that such service [*i.e.*, of the notice] is entirely without prejudice to your undertaking to the bank, and to their strict legal rights thereunder. We may mention that the object of the bank in adopting this present course is simply for the purpose of saving time and expense, which would necessarily arise if proceedings in equity were resorted to, with a view of compelling specific performance of your undertaking with the bank." The plaintiff, in a letter to the bank, acknowledging the receipt of the notice, denied his indebtedness in any larger amount than £4,500, and said, with reference to that sum: "I will immediately arrange for the payment of the balance; I will pay all the money secured by the three different mortgages." His letter was not answered by the defendants. *Held*, that these facts did not amount to a dispensation by the defendants with a tender by the plaintiff of the amount actually due on the mortgages, assuming that the claim for £20,029 8s. 3d. was an excessive demand. *Held*, also, that a demand of more than was actually due on the mortgages did not vitiate the notice under the Real Property Act (26 Vic., No. 9, s. 55). *Per* HARGRAVE, J.: If the owner of the different estates mortgage them to the same person, the mortgagee may insist that one security shall not be redeemed alone, but may demand the amount due on all the securities. On a motion for leave to appeal to the Privy Council from a rule absolute for a new trial, the Court stayed all proceedings under the rule for 12 months. CAMPBELL *v.* THE COMMERCIAL BANK - - - - - - 240

MUNICIPALITIES ACT. 1. In a paper signed by two ratepayers of a municipality nominating F. as a candidate for the office of alderman, F. was described as a "freeholder," and his place of residence was not mentioned. *Held*, that the election

was void, and a rule *nisi* to oust F. from the office of alderman made absolute with costs. *Ex parte Gow* (March 21, 1873) followed. *Ex parte* HASKING - - - - - - - - 151

2. An action will lie against a municipal borough, incorporated by the Act 31 Vic., No. 12, at the suit of a person sustaining a serious injury in consequence of the non-repair of streets, of which the council of the borough has "the care, construction, and management," by virtue of s. 117 of the same Act. (*Per* HARGRAVE and Sir W. MANNING, JJ.; Sir JAMES MARTIN, C.J., *dissentiente.*) M'PHERSON *v.* THE BOROUGH OF BATHURST - - - - - - - - - - - - 204

NEGLIGENT NAVIGATION OF STEAMER.

SHEATHER *v.* THE C. & R. R. S. N. Co. - - - - - - - 455

BLAXLAND *v.* A. S. N. Co. - - - - - - - - - - - - 434

DRURY *v.* A. S. N. CO. - - - - - - - - - - - - 434

NEGLIGENT USE OF WARP. The Navigation Act (35 Vic., No. 7), s. 120, enacts that the master of every ship or vessel navigating any harbour, &c., shall, so far as may be practicable, keep on that side of the fairway or mid-channel thereof which lies on his starboard hand. *Held (per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.), that these words do not compel a steamer to navigate in the fairway, but only fix the rule of the road for vessels plying in the harbour. A small ferry-boat plying outside the limits of the fairway, as marked by the Marine Board, is not departing from the rule. At the trial of an action for negligence, Sir *W. Manning*, J., told the jury that it did not follow because a plaintiff was somewhat in the wrong, that he should suffer when the substantial main wrong was on the other side; and that in that case he would not be responsible, although there might be some degree of wrongfulness on his side which might have caused the disaster. *Held (per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.), that the direction was wrong. The defendants warped out a large screw-steamer from their wharf at 11 o'clock on a dark night with a warp from 300 to 400 feet in length. The steamers which usually left the wharf at that hour were paddle-boats and used no warp. No notice was given of the change of steamers, nor was any precaution taken to warn persons of the presence of the warp, which was not visible. The steamer in which the plaintiffs were ran into the warp and they were injured. *Held (per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.), that there was sufficient evidence of negligence to support verdicts for the plaintiffs. *Per* HARGRAVE, J.: The rule in navigation is that a vessel in motion should keep out of the way of a vessel stationary, and the plaintiff was bound to prove affirmatively that no act on his part contributed to the accident. BLAXLAND v. THE A. S. N. Co. - - - - - - - - - - - - - - 434

NEW TRIAL. A new trial will not be granted on the ground that the damages were excessive unless they were outrageous or were calculated on a wrong principle. A person is not, by

an admission in a deed of an amount due by him, estopped from disputing the correctness of that amount when other securities are in question. A waiver by a mortgagor of all notices to be given by mortgagees under the Real Property Act extends only to mortgages upon the properties of which he is stated in the memorandum of waiver to be proprietor, and not to other properties (though under the Act) included in the same mortgages. CAMPBELL *v.* THE COMMERCIAL BANKING CO. OF SYDNEY - - - - - - - - - - 14

NOLLE PROSEQUI.

See CRIMINAL LAW.

OBSTRUCTING MESSENGER OF INSOLVENT COURT.

See CRIMINAL LAW.

OFFICIAL ASSIGNEE.

See PARTIES TO ACTIONS.

DETINUE.

PARTIES TO ACTIONS. Plaintiff, as official assignee of A., an insolvent, sued for the balance of payments due for work performed under a building contract between A. and the defendant. The defendant pleaded that before the sequestration A. abandoned the works under the contract, and that they were completed by W., one of A.'s sureties under a bond, to whom the defendant had given notice of A.'s default. The plaintiff replied, setting out the bond, from which it appeared that W. was liable in a penalty of £250 if A. did not finish the work, but was not bound to finish it himself. The replication went on to state that W. completed the work as and for A., "who thereupon and thereby duly finished the said work in accordance with the conditions of the said bond and under the provisions" of the original agreement under seal, and that the plaintiff was now suing for W., in order to recover the moneys due from the defendant for the benefit of W. *Held*, upon demurrer (*per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.; FAUCETT, J., *dissentiente*), that the replication was bad. *Per* Sir JAMES MARTIN, C.J.: There was no obligation upon W., under the original agreement or the bond, to complete the work, and it was done by W. under a new contract with the defendant, with which A. and his assignee had nothing to do. *Per* HARGRAVE, J.: The work was performed on behalf of A. and under the original contract, but the official assignee of A. could not sue as trustee for W. SANDEMAN *v.* COHEN - - - - - - - - - - - - - - - - - 371

2. Plaintiff, after the judgment of the Court (reported *ante*, p. 371), filed an amended replication setting out a bond, under which W. was surety for A. in the sum of £250, and one of its conditions which stipulated that in case of the insolvency of A. or any delay in or suspension of the work "the employer, by the architect, might give to the contractors or their sureties or their assignee or trustee, as the case might be, notice requiring the works to be proceeded with," and in case of default the defendant might

employ other persons to complete the work, and set off the expense against the money payable to A. under the contract. The replication went on to state that the defendant gave notice to W., and that W. proceeded with and completed the works according to the specifications, &c., and that the right of action vested in the official assignee of A., and that he was suing partly for his own benefit and partly for the benefit of W. *Held* (*per* HARGRAVE and FAUCETT, JJ.; Sir JAMES MARTIN, C.J., *dissentiente*), that the replication was good. SANDEMAN *v.* COHEN - - - - - - - - - - 496

PETITION OF RIGHT. An Act of Parliament (37 Vic., No. 2) provided that grants of certain portions of reclaimed land should be issued to certain persons named in the schedule to the Act, "upon the establishment by such persons of their respective titles to the portions of land" deprived of their water-frontage by the reclamations. N. filed a petition, under the Act 24 Vic., No. 27, as transferee of some of the persons named in the schedule to the Act, against the Crown for delay in issuing a grant. The petition contained no allegation that N. had established her title, though it had been stated that an abstract of the title had been forwarded to the Crown Solicitor. Upon demurrer:— *Held* (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; HARGRAVE, J., *dissentiente*), that the petition did not sufficiently allege that the suppliant had established her title. *Held*, also (*per* HARGRAVE and Sir W. MANNING, JJ.; *dissentiente*, Sir JAMES MARTIN, C.J.), that, although the suppliant was not named in the schedule to the Act of Parliament, she had a right to compensation against the Government, and that the petition might be amended by adding an allegation that the suppliant had established her title. NERNEY *v.* THE QUEEN - - - - - - - - - - 287

PERJURY.

See CRIMINAL LAW.

POSSESSION.

See STATUTE OF LIMITATIONS.

POWER OF EXECUTORS TO SELL REAL ESTATE.

See WILL.

PRACTICE. 1. A demurrer set down for hearing by the defendant without any Judge's order was struck out of the paper and the demurrer-book ordered to be taken off the file. FREEMAN *v.* WITHERS - - - - - - - - - - - - - - - 6

2. The Court discharged with costs a rule *nisi* for a prohibition, in which the grounds were not stated in compliance with Rule 16, and which did not come within the exceptions in Rule 17. KEARNS, *Ex parte* - - - - - - - - - - 13

3. Where the damages in an action for malicious prosecution amounted to £500 only, the Court fixed the terms of an appeal to the Privy Council from an order discharging the rule for a new trial. OWSTON *v.* THE BANK OF NEW SOUTH WALES - - - - - - - - - - - - - - - - - - - 90

4. Where a count was abandoned at the trial, and the jury found a general verdict for the plaintiff, the defendant should apply to the Judge who tried the case, and not to the Court, to have the verdict entered for him on the abandoned count. CAFE *v.* MORRISON - - - - - - - - - - - 161

5. Where a Judge's order for the payment of certain costs was, upon a motion made in ignorance that the costs had been paid, made a Rule of Court with costs, the Court, though the expenses of obtaining the Rule had been incurred before the money was paid, rescinded the Rule. Where the money ordered by the Judge to be paid is paid at any moment before the rule is obtained, there has not been a disobedience of the order within the meaning of the 9th Supreme Court Rule of the 28th February, 1856. BEDWELL, *In re*- - - - - - - - - - - - - - - - - 186

6. Plaintiffs issued a writ against the defendants, who were merchants in Melbourne. The writ was indorsed by the sheriff's officer as required by the Act 18 Vic., No. 6, and after proceedings in accordance with the Absent Defendants Act, a writ of attachment was obtained against moneys in Sydney alleged to belong to the defendants. Upon the return to the writ of attachment, it appeared that the moneys had ceased to belong to the defendants, and the Judge refused to make an order. The plaintiffs, without service of the writ or any of the proceedings upon the defendants, proceeded in the action and signed final judgment for want of a plea. Upon motion of the defendants in Chambers, *Hargrave*, J., set aside all proceedings in the action with costs. On motion for a rule *nisi* to set aside the order of *Hargrave*, J., *held*, that the Judge was right, and rule refused. *Held*, also, that it is essential to the validity of proceedings taken under the Absent Defendants Act that the defendants should be entitled to or interested in property or debts in the colony of New South Wales. JOHNSON *v.* POOLE - - - - - - - - - - - 196

7. It is a sufficient compliance with Rule 5 of the 1st of March, 1856, if a Rule of Court is signed by the chief clerk "for the Prothonotary." SEVIL *v.* HEATH - - - - - - - 200

8. Defendants moved to set aside an order of Sir *W. Manning*, J., under 17 Vic., No. 21, s. 16, giving leave to the plaintiffs to proceed in the action, on the grounds that the defendants were resident out of the jurisdiction, and that if judgment were obtained against them by default, the Supreme Court of Victoria would issue execution upon a memorial of such judgment without giving the defendants an opportunity for going behind the judgment. *Held*, no grounds for setting aside the order. The plaintiffs sued for commission due from the defendants in respect of the sale of a station. The employment of the plaintiffs was partly by letters passing between the defendants at Melbourne and the plaintiffs at Sydney, partly by communications between the plaintiffs and S., acting as agent of the defendants in Sydney. The sale was effected in

Sydney, and the station was in New South Wales. *Held*, that the cause of action arose within the jurisdiction. *The Brisbane Oyster Fishery Company* v. *Emerson* explained. JOHNSON *v.* POOLE - - - - - - - - - - - - - - - 394

9. In an action for damages for breach of a contract to purchase a vessel, "if on seeing her on the slip she was good," an application was made by the plaintiff for inspection of reports made to the defendant by S., a marine surveyor, whom he had employed to inspect the vessel. *Held*, that they were not documents to the production of which the plaintiff was entitled. ELLIS *v.* MEYERFIELD - - - 336

10. The copy writ of summons served upon the defendant did not contain the name of the Police Magistrate who signed the original writ, nor was the day of the month stated The defendant, acting upon the advice of his attorney, disregarded the plaintiff's proceedings altogether. The plaintiff signed judgment, and the cause came on for assessment of damages some months after the issue of the writ. Damages were assessed at £500, and the defendaut subsequently moved in Chambers to set aside the service of the writ and all subsequent proceedings. *Hargrave*, J., granted the application with costs. On appeal, *held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dissentiente*), that the omission of the signature in the copy writ was, at most, an irregularity only, and that the defendant's application was made too late. SEVIL *v.* HEATH- - - - - - - - - - - - - - - - - - 359

PREFERENCE.

See INSOLVENCY ACTS.

PRIVY COUNCIL APPEAL. 1. The Court refused to stay proceedings upon a judgment for the plaintiffs in ejectment pending an appeal by the defendants to the Privy Council, but suspended the issue of the *habere* for 6 months. LAING *v.* BAIN- 284

2. On fixing the terms of an appeal from a Rule of Court. ordering a new trial, the plaintiff was given leave to go on a new trial, the amount of the verdict, if in his favour, to be paid into Court to abide the event of the appeal. M'PHERSON *v.* THE BOROUGH OF BATHURST - - - - - - - 370

See PRACTICE.

PROMISSORY NOTE. 1. Plea to an action on a promissory note that it was agreed, contemporaneously with the making of the note, that when the note became due it should not be paid, but should be renewed for three months by a promissory note for a similar amount, and that the note was overdue when indorsed to the plaintiff. *Held*, a bad plea. Plea that B., by warranting certain mill-board, sold it to the defendant, and that the note was given in part payment of the price, but the mill-board was wholly worthless and unmerchantable, and that the note was overdue when indorsed to the plaintiff. *Held*, a good plea. HYMAN *v.* BENSON - - - - - - - - - - - - - - - - - 4

2. To a declaration on a promissory note by payee against maker, the defendant pleaded on equitable grounds that the plaintiff agreed with him to stay all proceedings in the action, and instructed his attorney to that effect, on the defendant agreeing to pay all the expenses incurred by the plaintiff in the action up to the time of the agreement, together with the amount due to the plaintiff, in full, immediately on the sale of a steamer belonging to the defendant, and that the defendant was always ready and willing to carry out his agreement. On demurrer, *held*, a bad plea. SKAMER *v.* MANNING - - - - - - - - - 305

3. The defendant lived 30 miles from a post-town D., where there was no delivery, but letters were kept till called for. Notice of dishonour of a promissory note indorsed by defendant was sent, on the day it came from the bank, to an innkeeper at D., with instructions to serve it at once. He did not call at the post-office for two or three days, when he received the notice, and served it the same day as received. *Held*, that, under the circumstances, the notice was reasonable. What will amount to waiver of due notice of dishonour?—*Quære.* MCELHONE *v.* YOUNG - - - - - 493

4. The defendants sent a note drawn at four months to B. to be indorsed and returned for their accommodation. B. altered the due date from 4 to 2 months and discounted it without the knowledge or consent of the defendants. The note at the expiration of 4 months was presented by the plaintiffs and dishonoured. The defendants did not at first contest their liability on the note and paid £50 on account, besides entering into negotiations with the plaintiff to substitute other notes. On the trial the jury found that the defendants had assented to the alteration of the note both before and after maturity. *Held*, that there was evidence from which the jury might find that the defendants assented before maturity. Whether assent after maturity would make the note good?—*Quære.* COMMERCIAL BANKING CO. *v.* STRAUSS - - - - - - - - - - - - - - - - - 524

QUO WARRANTO.

See MUNICIPALITIES ACT.

REAL PROPERTY ACT, 1862. 1. The trustees appointed under the Underwood Estates Acts having applied to the Registrar-General to bring certain lands comprised in those Acts under the provisions of the Real Property Act, the Registrar-General refused to issue a certificate of title unless certain incumbrances created by the devisees under the will of James Underwood were noted on the certificate, and unless two caveats lodged against the application were removed. *Held*, that the trustees took the estate freed and discharged from all the trusts or derivative interests arising under the will, and that such interests should not be noted as incumbrances on the certificate. *Held*, also, that where a caveator has issued a writ, and judgment of *non. pros.* has been signed, the caveat is at an end. *Held*, also *(per* Sir JAMES MARTIN, C.J., and

FAUCETT, J.; HARGRAVE, J., *dissentiente*), that where a writ has been issued and renewed, but there has been no service on the applicant, and the renewal has been in each case without any *præcipe* and no further proceedings have been taken, the caveat must be removed by an application under the 82nd section of the Real Property Act. *Ex parte* PENNINGTON - - - - - - - - - - - - - - - 376

2. A caveat under the Real Property Act, 1862, was lodged on the 21st of January, 1876. A writ of summons was issued on the 28th of April following, and was renewed from time to time, but was never served. Under these circumstances a rule *nisi* to remove the caveat under s. 82 of the Real Property Act was made absolute with costs. *Ex parte* PENNINGTON - - - - - - - - - - - - - - - 317

REGISTRATION OF WRIT.

See WILL.

RESIDENCE.

See DISTRICT COURTS ACT.

SMALL DEBTS COURT. An administratrix sued in her own name in the Small Debts Court at Bega for a debt due to her deceased husband. *Held (per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; *dissentiente*, HARGRAVE, J.), that a prohibition should be granted. *Ex parte* BROWN - - - - 320

SMALL DEBTS ACT. An infant cannot sue under the 18th section of the Small Debts Act to recover damages for the detention of goods. *Ex parte* ADAMS - - - - - - - 459

SOUNDNESS OF HORSE. The plaintiff sued for the balance of the purchase money of a race-horse. The defendant pleaded that he had returned the horse to the plaintiff "in good and sound order and condition," as he was at liberty to do under the contract. At the trial the Judge rejected evidence to shew the treatment of the horse while he was in the defendant's possession, and evidence of the state and condition of the horse when he was first delivered to the defendant. *Held*, that his Honor was right in rejecting such evidence. *Per* HARGRAVE and Sir W. MANNING, JJ.: The defendant under the covenant was bound to return the horse in absolutely good and sound order and condition, without any reference to the state the horse was in when he was first delivered to the defendant. HALL *v.* IVORY - 401

STATUTE OF FRAUDS. The following agreement was signed by the defendant:—"Tenterfield, 25th March, 1875. I, the undersigned, do agree to deliver at the kiln to Mr. W. S. Lockhart [the plaintiff] thirty thousand good hard bricks, at the rate of 30s. per thousand, the said bricks to be delivered in four months from this date." The District Court Judge nonsuited the plaintiff on the ground *inter alia* that the document mentioned above was not an agreement in writing within the Statute of Frauds. On appeal: *held*, that the nonsuit was wrong. LOCKHART *v.* DUMOCK - 181

STATUTE OF LIMITATIONS. Upon the trial of an action of ejectment, in which the defence was possession under the Statute of Limitations, Sir *James Martin*, C.J., directed the jury that the evidence of any acts of possession done subsequently to the commencement of the period of 20 years before action brought was immaterial; that for the purpose of shewing a possessory title the same particularity was required in defining the area and boundaries of the land as would be required in shewing a title under a deed of conveyance; that certain acts, such as putting up fences, &c., did not amount to possession unless done with the intention of excluding all comers from the land; and also that there was no evidence in support of parts of the defendants' case. A rule *nisi* for a new trial being moved for on the ground of misdirection, Sir JAMES MARTIN, C.J., and HARGRAVE, J. (FAUCETT, J., *dissentiente*), refused the rule. *Per* Sir JAMES MARTIN, C.J., and HARGRAVE, J.: The verdict was not against evidence. *Per* FAUCETT, J.: The *Chief Justice* went too far in saying that there was no evidence upon some of the points, and ought not to have taken the case from the jury. What is sufficient evidence of possession under the Statute of Limitations considered. LAING *v.* BAIN - - - - - - - - - - - - - - - - - - 264

STREETS, LIABILITY OF COUNCIL TO REPAIR.
See MUNICIPALITIES ACTS.

TEMPORARY COMMONS. The trustees of a permanent common have power to make regulations for the management of a temporary common in the same locality. (*Per* HARGRAVE, J., and Sir W. MANNING, J.; FAUCETT, J., *dissentiente*). *Ex parte* TONK. - - - - - - - - - - - - - - - 362

TRESPASS. The plaintiff in an action of trespass claimed under an authority from the owner of the *locus in quo* to go upon it and cut timber. At the trial he tendered evidence of acts done by the defendant after action brought, and shewing a persistence in his claim to the ground on which the plaintiff was working. The *Chief Justice* excluded the evidence. On a motion for a rule *nisi* to set aside a nonsuit on the ground that the evidence was improperly excluded, *held* (*per* Sir JAMES MARTIN, C.J., and FAUCETT, J.; HARGRAVE, J., *dubitante*), that the ruling was right. LONG *v.* DRINAN 152

See CROWN LANDS ACTS.
IMPOUNDING ACT.
MEASURE OF DAMAGES.

UMPIRE, DUTIES OF.
See ARBITRATION.

UNCERTAINTY IN DEVISE.
See WILL.

UNCERTAINTY IN DESCRIPTION.
See CROWN LANDS ACTS.

VAGRANT ACT. 1. A person who has horses not belonging to him in a stockyard is not there for an unlawful purpose within the meaning of the 3rd section of the Vagrant Act (15 Vic., No. 4). A stockyard in a remote place in the bush is not "an enclosed yard" within the same Act and section (*per* Sir JAMES MARTIN, C.J., and Sir W. MANNING, J.; *dissentiente*, HARGRAVE, J.). READ & WHITE, *Ex parte* - - 26

2. A. was convicted under section 6 of the Vagrant Act with using insulting behaviour towards B. B. was coroner and was late at an inquest to which A. was summoned as a juryman. A. said "It is hard to be summoned for 9 o'clock. B. could not attend because he had not his cows milked, and had to supply the stores with butter before he could attend to his business." After repeating these words he said "I'm not a toady, and get no favours." He afterwards followed B. and said "I defy you!" and screamed after him. *Held*, that the conviction was wrong. *Ex parte* COLLIER - - - - - - - - - - - - - - - - - 513

WAGERING CONTRACT. Under an agreement between the plaintiff and [illegible], £200 was deposited with the defendant as stakeholder to abide the event of a hurdle race between two horses owned by the plaintiff and G. respectively, with a condition that unless the whole stake was made good by a certain day the deposit should be forfeited. The plaintiff, before the day fixed for the match, declared it off, and sued for a return of the deposit. The District Court Judge held that the transaction was protected by the proviso to the 8th section of the Act 14 Vic., No. 2, and nonsuited the plaintiff. *Held* (per [illegible], JJ., *dissentiente*, Sir JAMES MARTIN, C.J.), that the District Court Judge was right. *Hogan* v. *Curtis* followed; *Diggle* v. *Higgs* not followed. TRIMBLE *v.* HILL - - - - - - - - - 472

WILL. The Court will, if necessary, transpose or supply words in a will in order to carry out the apparent intention of the testator. A will contained the following clauses:—"I nominate and appoint my said wife H. sole executrix of this my will, and hereby direct that all my just debts, funeral and testamentary expenses be fully paid and satisfied as soon as conveniently may be after my decease." The testator's real property was devised by the same will to T. R. T. R.'s interest in the land was sold under a *fi. fa.* and conveyed by the Registrar of the District Court. *Held*, that the Registrar could make a good title without the concurrence of the executrix. It is no objection to the validity of a deed of bargain and sale executed by a District Court Registrar under s. 79 of the District Courts Act of 1858, that the writ of *fi. fa.* was not registered previously to the sale. *Ex parte* POLLARD - - - - - - - - - 501

WRIT OF SUMMONS.

See PRACTICE.

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